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IN THE

Supreme Court of the United States

Michigan State Unemployment Agency,
Department of Consumer & Industry Services,

Petitioner,

v

Randall L. Frank, Trustee,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Michigan Unemployment Agency filed valid state tax liens several years before the debtor filed for bankruptcy. During bankruptcy administration, the Trustee recovered preference payments the debtor had made to unsecured creditors and claimed that the funds should be redistributed against all estate claims equally, including the state's tax lien claim. The Court of Appeals and the lower courts fashioned a dichotomy of ownership theory and held that the pre-petition state tax lien applied only to the "debtor's" property, not the "estate's" property. It further held that the lien had been extinguished and did not attach to the preference proceeds the Trustee recovered.

When an insolvent debtor in chapter 7 bankruptcy transfers property to unsecured creditors and the property returns to the estate upon the Trustee's avoidance of the wrongful preferential transfers, can the transactions defeat a valid perfected tax lien that had been in effect for more than three years before the debtor filed for bankruptcy?

PARTIES TO THE PROCEEDING

The only parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption. In addition, the debtor in the bankruptcy court, who was not a party to the appeal, is Anderson Fiberglass, Inc., a Michigan corporation d/b/a Thompson Boat Company.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-4a) is reported at 252 F.3d 852. The opinion of the District Court (App. 8a-18a) is reported at 261 B.R. 909. The District Court's order denying rehearing (App. 19a-21a) is reported at 2000 WL 33351830, and the Bankruptcy Court's opinion (App. 22a-35a) regarding the Trustee's motion for summary judgment is unreported.

JURISDICTION

The Court of Appeals entered judgment on June 6, 2001. App. 1a. The Court entered an order denying rehearing on July 11, 2001. App. 5a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutes appear in the appendix, included *infra*, at the pages noted in the table of contents.

Bankruptcy Code

11 U.S.C. § 101(53)	36a
11 U.S.C. § 502	37a
11 U.S.C. § 541	42a
11 U.S.C. § 547	46a
11 U.S.C. § 550	52a
11 U.S.C. § 551	54a
11 U.S.C. § 552	55a
11 U.S.C. § 724	56a

Internal Revenue Code

26 U.S.C. § 6321	58a

Michigan Employment Security Act (MESA)

Mich. Comp. Laws § 211.682 59a
Mich. Comp. Laws § 421.15 60a

STATEMENT

In 1998, in preparation for final distribution in the bankruptcy proceeding of Thompson Boat Company, the chapter 7 Trustee, Randall Frank, asked the Michigan Unemployment Agency's Tax Office to amend the secured tax claim it had filed against Thompson Boat's estate to reclassify it as a general unsecured claim. In his written request, the Trustee's legal counsel advised the Tax Office that, after selling all estate assets and turning over the funds to the first secured lender bank, and because the liabilities on the UA's tax lien were over 3 years old, there were no assets to which the lien could attach.

The Tax Office was not given authorization to amend the claim because it had properly recorded notices of its tax lien with the Saginaw County Register of Deeds and with the Michigan Secretary of State several years before Thompson Boat filed for bankruptcy. No basis existed to change the classification of the UA's claim from secured to unsecured because there were assets in the estate to which a tax lien could attach but to which a consensual lien could not and because the lien remained unsatisfied.

When the UA would not amend its claim, the Trustee filed a complaint with the Bankruptcy Court that alleged the UA's lien did not attach to preference payments recovered by the Trustee that the debtor had made to unsecured creditors, which comprise about $300,000 of the $490,000 estate assets. A preference is a payment that is made to a creditor within the 90 days immediately prior to a bankruptcy filing; it favors the creditor by allowing him to receive more than he would have

received had the (preference) funds remained in the debtor's estate for distribution according to the priorities outlined in the Bankruptcy Code. The UA's lien was then, and remains, valued at about $230,000.

In answer to the complaint, the UA asserted its lien against the assets in the chapter 7 estate, including preference recoveries. The UA asserted that section 552 of the Bankruptcy Code, 11 U.S.C. § 552, prevents the consensual lien from attaching to property that a bankruptcy estate acquires once a case commences but no provision in the Code similarly prevents a statutory lien from attaching.

The UA further asserted that its lien encumbers all personal property assets in the estate but that its interests in the assets are subordinated to the priorities listed in Code section 724. 11 U.S.C. § 724. The UA admitted that if there were no surplus from the Trustee's sale of real property assets, the UA would be precluded from asserting its county-recorded lien against sale proceeds of the debtor's real estate.

The Trustee moved the Bankruptcy Court for summary judgment, claiming that the UA is a general unsecured creditor because its lien does not encumber preference recoveries. The Trustee claimed that such recoveries are not "proceeds of the [UA]'s collateral within the meaning of §552(b)(1)" because only a trustee can pursue a preference action. The Trustee further claimed that the Code's automatic stay prevents liens from attaching to the preference. The Trustee claimed that "recovered preference proceeds are post-petition property of the estate preserved for equal distribution to all creditors of the estate."

In response, the UA asserted again that its lien is valid to encumber all personal property of the estate not otherwise encumbered, that no provision of the Bankruptcy Code prevents a statutory lien from attaching to property the estate

acquires after commencement of a case and that the automatic stay does not prevent a perfected statutory tax lien from attaching to a debtor's estate assets since a trustee acquires property subject to existing liens. The UA re-asserted that under Bankruptcy Code section 724 tax liens must be satisfied before unsecured claims, although behind the priorities to which they are subordinated.

The Bankruptcy Court ruled that under the UA's own lien statute, its lien may attach only to a debtor's property and not to estate property. App. 24a. The Court concluded that because the debtor taxpayer had given away the preference moneys, once the Trustee recovered the funds, the UA's lien could not attach because the preferential transfers had *extinguished* the UA's lien in the property. App. 34a. The Court founded its conclusion on an estate/debtor ownership dichotomy (dual entity concept). App. 25.

The UA appealed to the District Court because the statute governing the lien does not provide for the extinguishment of liens. It provides for a lien to continue until it is satisfied through payment or until it becomes unenforceable due to lapse of time. At the time of the debtor's bankruptcy filing, the subject lien had not lapsed. Further, there is no recognized dual entity concept in bankruptcy jurisprudence.

On appeal, the District Court, nevertheless, concluded that the debtor/estate dichotomy applies and the pre-petition lien could not attach to the post-petition preference proceeds the Trustee recovered for the estate. App. 17a. The UA again appealed, reasserting its earlier arguments.

The Sixth Circuit Court of Appeals adopted the reasoning of the District Court, approving the "conclusion that the UA's pre-petition liens do not reattach by operation of law to proceeds recovered by the bankruptcy trustee in post-petition preference actions." App. 4a.

The Sixth Circuit denied the UA's petition for rehearing, in which the UA asserted that the Court's construction of the lien statute does not harmonize with the preference section in the Code or with preference policy and that the Court's ruling is inconsistent with the absolute priority rule as applied in both chapter 11 and chapter 7 cases.

REASONS FOR GRANTING THE WRIT

The Court's decision departs from established precedent in *Long v. Bullard*, 117 U.S. 617 (1886), *Johnson v. Home State Bank*, 501 U.S. 78 (1991), *United States v. Bess*, 357 U.S. 51 (1958), and *Michigan v. United States*, 317 U.S. 338 (1942) with respect to the effect of valid liens in bankruptcy.

The Court's decision is also a departure from a case it decided in 1987, where the Court said that "property is not distributed to the 'estate' until all liens, both tax and nontax, are satisfied." *United States v. Darnell (In re Darnell)*, 834 F.2d 1263, 1268 (6th Cir. 1987). Recognizing that the priority of competing liens is determined by non-bankruptcy law, *Darnell* accepted the conclusions put forth in *Pearlstein v. U.S. Small Business Administration*, 719 F.2d 1169, 1176 (D.C. Cir. 1983), that the relative priorities of competing liens are determined by non-bankruptcy law.

Until this decision, a valid tax lien deserved priority over an unsecured debt in the distribution of general assets of a liquidating estate. In this connection, although Congress, in section 552 of the Code, has limited the reach of consensual liens to assets acquired by a debtor's estate, Congress has not likewise limited the reach of statutory liens. The Code is silent with respect to the distribution of preference recoveries, but it details classes of claims to be paid in a prescribed order of priority from estate assets, with general unsecured claims paid

last. The Code details the treatment of statutory liens meticulously in section 724.

This decision violates the principle that Congress, not courts, determines the relative equities for categories of claims in providing for the distribution of assets in bankruptcy proceedings. *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23, 28 (1940). It is also established that a lien passes through bankruptcy unaffected. *Long v. Bullard*, 117 U.S. at 620-621 (1886). And a lien is a claim enforceable against property of the debtor in bankruptcy. *Johnson v. Home State Bank*, 501 U.S. at 85. Moreover, a lien follows property wherever it is transferred. *United States v. Bess*, 357 U.S. at 57. "'It is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes cum onere.'" *Michigan v. United States*, 317 U.S. 338, 340 (1942). *Aldine Mfg. Co. v. Phillips*, 118 Mich. 162, 167, 76 N.W. 371 (1898) (possession not required for existence of lien). *U.S. v. Cache Valley Bank*, 866 F.2d 1242, 1245 (10th Cir. 1989) (to the effect that the lien transfers with personal property).

1. Valid liens are effective against estate assets.

The decision of the Court of Appeals disregards all of the foregoing principles. It also rests on an unsound perception of the role of a preference action in bankruptcy and on an improper interpretation of the federal bankruptcy statute in relation to established principles of tax law recognized in bankruptcy. The result of the decision is the improper treatment of a valid tax lien in bankruptcy inconsistent with the aims and purposes--and the plain meaning--of the Bankruptcy Code.

The UA's lien is a statutory lien defined in 11 U.S.C. § 101(53). Under the Bankruptcy Code definition, a statutory lien arises solely by force of a statute and does not include a

security interest [lien created by agreement under 11 U.S.C. § 101(51)].

Under state law, "(a) lien is not an essential element of the power of taxation. . . . Unless a taxing statute expressly so provides, taxes do not constitute a lien on property." *City of Gaylord v. City Clerk*, 378 Mich. 273, 301, 144 N.W.2d 460, 471 (1966). Consistent with the tenet expressed in *City of Gaylord*, the Michigan Legislature has expressly provided for the creation of a lien upon property for unemployment taxes that are unpaid when due. The lien "shall be a first and prior lien" on property--except for liens recorded before it. In addition, "the lien shall attach to the property and rights to property, real and personal, belonging to the employer." Mich. Comp. Laws § 421.15(g).

Michigan courts have not determined the scope of the lien's reach over the employer-taxpayer's property. But cases interpreting similar language (*i.e.*, unpaid taxes are "a lien. . . upon all property and rights to property, whether real or personal, belonging to such person," 26 U.S.C. § 6321), which provides for a federal tax lien hold that the federal lien attaches to all property and rights to a taxpayer's property, including property subsequently acquired by the taxpayer. *United States v. Dishman Independent Oil, Inc.*, 46 F.3d 523, 525 (6th Cir. 1995), citing *Glass City Bank v. United States*, 326 U.S. 265 (1945). *See also*, *United States v. National Bank of Commerce*, 472 U.S. 713 (1985) (lien attaches to every interest in property a taxpayer might have). It is a reasonable inference that the Michigan Legislature mimicked the federal statute in anticipation of a similar interpretation regarding the scope of the lien it created.

The federal statute does not specifically state that the federal tax lien will continue until it is paid, but this appears to be a safe conclusion. Even so, the Michigan statute does provide that a lien arises "from and after the date that a report

[tax return]" is due and shall continue until "the liability . . . or a judgment arising out of the liability is satisfied or becomes unenforceable by reason of lapse of time." Construing the phrase, "shall continue until paid," found in the Michigan general property tax statute and citing *Auditor General v. Carpenter*, 138 Mich. 669, 671-672, 101 N.W. 1025 (1904), the Bankruptcy Court for the Western District of Michigan concluded that, for all intents and purposes, "the lien is perpetual." *Matter of Sabec*, 137 B.R. 659, 665 (Bankr. W.D. Mich. 1992). While an unemployment tax lien is not perpetual because the lien may become unenforceable due to lapse of time, the Michigan Supreme Court has determined the life of the lien to be six years. *Unemployment Compensation Comm. v. Vivian*, 318 Mich. 598, 607-609, 29 N.W.2d 102, 105-106 (1947). When Thompson Boat filed its bankruptcy petition, the UA's lien had continued in effect and had not lapsed.

In addition to creating a lien on property for unpaid taxes, the statute provides for recording a notice of lien with the county where the taxpayer's property is located. Mich. Comp. Laws § 421.15(e). The State Tax Lien Registration Act, Mich. Comp. Laws §§ 211.681-211.687, also provides for the central recording of a state tax lien. The UA recorded its lien under both statutes. The validity of the lien is not at issue here. The only question is: What is the effect of a valid, perfected tax lien in bankruptcy?

The State's tax lien statute defines lien rights in property, underpins the validity of the lien claim against the debtor's estate, and is the basis for a secured tax claim, which may be disallowed only as specified in the federal statute. 11 U.S.C. § 502(b). The distribution of assets on allowed claims is also governed by the federal statute.

The Court of Appeals erred in ruling that preferential transfers recovered for the debtor's estate are not subject to the tax lien. The Court agreed with the District Court that under a

"dual entity concept," *i.e.*, an ownership dichotomy between the property of the debtor and property of the estate, a trustee does not "[stand] in the shoes of the debtor" and does not have the same obligations the debtor has with respect to property.

The dichotomy or dual entity theory clouds black letter law and runs afoul of longstanding bankruptcy policy. The Court of Appeals erred in embracing the estate/debtor dichotomy to defeat statutory liens. The dual entity theory evolved in the Bankruptcy Court opinion. App. 24a-25a.

In its opinion, the Bankruptcy Court maintains that the duality (of debtor and estate) concept is indispensable to a proper understanding of the Bankruptcy Code's preference provision, reasoning that since a debtor does not "own" an interest in the preference actions of the Trustee, the UA's liens cannot reach the preference recoveries (App. 31a) because they are outside the scope of section 15(e) of the Michigan Employment Security Act. This is not the correct test of whether a lien is entitled to satisfaction through the recovered preference, however. The test, as outlined by federal law in the preference statute, involves determining whether the preferential transfer allows a creditor to receive more because of the transfer than that creditor would have received had the transfer not been made and the assets distributed under the Code as if they had never left the estate. 11 U.S.C. § 547(b)(5). *See generally, Levit v. Ingersoll Rand Financial Corporation*, 874 F.2d 1186 (7th Cir. 1989). In this case, the UA did not receive a transfer within 90 days of bankruptcy but a number of unsecured creditors did.

The preferential transferees, because of the transfers, received $300,000 more than they would have been entitled to had the funds remained in the debtor's possession as part of the debtor's estate. Had the funds remained in the estate, the Code would have required satisfaction of secured and priority claims

out of them before payment of general unsecured claims as a class.

Had the UA received a payment on its lien during the preference period, the transfer would not have been voidable because the payment would have been in satisfaction of its lien. The UA would not have received more because of the transfer than it would in liquidation of the estate. Returning the funds to the estate would not entitle a prior consensual lien to be satisfied out of them. This is so because under 11 U.S.C. § 552, a consensual lien[1] would not reach property that the estate acquired after the commencement of the case even if the lien were "first in time" as compared with the statutory lien. Again, the Code does not so limit the reach of the statutory lien.

If payment on the UA's lien is not thus preferential in relation to a prior consensual lien, surely it cannot be a preference as to an unsecured claim. If the lien is entitled to satisfaction from the debtor's property before bankruptcy, it is entitled to satisfaction after bankruptcy filing--from bankruptcy estate property. The Court's construction of the lien statute, applying a dichotomy theory (that the estate owns property in a different capacity than the debtor) to divest the lien of interests in the debtor's property, is wrong.

But the District Court observed that the UA did not "show that any court has ever rejected the [debtor/trustee dichotomy] application in the context of preference actions by a trustee." (App. 13a). This assertion is correct. The reason for the omission is that there is no published case that relies on,

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[1] If a consensual lien creditor holds property that falls within one of the applicable exceptions in 11 U.S.C. § 547(c) [i.e., subsections (3), (4), or (5)], however, its lien will reach the property. If a trustee claimed a cause of action in such assets, he could not avoid the transfer to the lien creditor if the statutory defenses were raised. Therefore, none of the funds at issue here could belong to such a creditor.

or discusses, a dual entity concept as it relates to preference actions. This is the first to do so, and the Bankruptcy Court's opinion develops the concept by relying on two bankruptcy decisions it penned --*In re Winom Tool & Die, Inc.*, 173 B.R. 613 (Bankr. E.D. Mich. 1994), and *Walat Farms v. United States (In re Walat Farms, Inc.)*, 69 B.R. 529 (Bankr. E.D. Mich. 1987). App. 24a.

Winom Tool discusses at length an individual debtor's right to exempt assets from the estate. It concludes that since an individual debtor with exempt assets unavailable for distribution to creditors, is a legal entity separate from the debtor's bankruptcy estate, a corporate bankruptcy estate must likewise hold assets in two capacities. Exempt assets are, however, encumbered by perfected statutory liens. Under 11 U.S.C. § 522(c)(2)(B), exempt property is not liable for any pre-petition debt except (with certain other listed exclusions) "a debt secured by a lien that is a tax lien, notice of which is properly filed." All property of a corporation pours into the estate because a corporation has no exempt property under section 522. ["Notwithstanding section 541, an individual debtor may exempt property. . . ." 11 U.S.C. § 522(b)].

Likewise, *Walat Farms* must be discredited. *Walat Farms* quotes Collier on Bankruptcy for the proposition that claims arising after the commencement of a case lack mutuality for set off "because the post-petition trustee or debtor-in-possession is a different entity from the pre-petition debtor." *Walat Farms*, 39 B.R. at 530 quoting 4 Collier on Bankruptcy ¶ 553.08 (15th ed. 1986).

However, Collier now disavows the dichotomy or dual-entity concept, if they once endorsed it. In discussing whether, for the purposes of a creditor's right to offset a debt owed the debtor against a claim it holds against the debtor with respect to separate obligations arising from the same transaction, Collier takes the position that courts should not require that the

claim and the debt both be pre-petition in nature as an element of mutuality. Some courts impose the requirement, Collier says, because they reason that the debtor is replaced by a trustee or debtor-in-possession, establishing a new "entity" that cannot owe a debt in the same capacity as the pre-petition debtor. Thus mutuality is defeated. Collier opined that, apart from being unnecessary, the two entity theory makes too much of the distinction between the debtor and the debtor-in-possession or trustee, citing *NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 528 (1984):

> As explained by the Supreme Court in a related context: "For our purposes, it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing." 5 Collier On Bankruptcy ¶ 553.03[3][g][ii] (15th ed. 2000) quoting 465 U.S. at 528. .

In accepting the dual entity concept, the Court below quoted, but declined to accept, the very reasoning in *Bildisco* that Collier found worth quoting and accepting. App. 13a.

Further discussing the dual entity concept, Collier states: "Another justification [for it] is that the trustee (or debtor-in-possession) is a 'fiduciary,' and therefore cannot owe a debt or hold a claim in the same capacity as the pre-petition debtor. This dichotomy likewise rings hollow." *Id. Accord, In re National Financial Alternatives, Inc.*, 96 B.R. 844, 849-850, n. 10 (Bankr. N.D. Ill. 1989.

This Court's pronouncement in *Johnson v. Home State Bank*, 501 U.S. at 87, that a court must allow a claim if it is enforceable against *either* the debtor *or* his property further

weakens the debtor-estate dichotomy theory. The decision explained: "[W]e must infer that Congress fully expected that an obligation enforceable only against a debtor's property would be a 'claim' under § 101(5) of the Code." *Id.*

Even if a debtor is discharged from personal liability, a lien remains effective against the debtor's estate assets. Unlike an individual debtor, since a corporation will not receive a discharge in chapter 7,[2] following the analysis in *Johnson,* the estate assets will be subject to a valid lien, and any assets the estate may abandon will also be subject to the lien, with the qualification that the underlying debt can be satisfied only once. In short, the dual entity concept lacks foundation.

2. A trustee stands in the shoes of the debtor.

The Sixth Circuit further rejected the notion that the trustee stands in the shoes of the debtor. In contrast, this Court has recognized that the trustee stands in the debtor's shoes and has said that, as a result of this role, "the property in [the trustee's] hands is subject to the equities impressed upon it while in the hands of the bankrupt." *Knapp v. Milwaukee Trust Co.*, 216 U.S. 545, 557 (1910). Further, "a receiver appointed by a federal court takes property subject to all liens, priorities, or privileges existing or accruing under the laws of the state." *Marshall v. New York*, 254 U.S. 380, 385 (1920). "It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt. . . ." *Security Warehousing Company v. Hand,* 206 U.S. 415, 423 (1907). The dual entity concept seeks to avert this important, longstanding precept recognized in the body of bankruptcy law.

Several circuit courts of appeal have more recently recognized that a bankruptcy trustee stands in the debtor's

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[2] 11 U.S.C. § 727(a) The court shall grant the debtor a discharge, unless--(1) the debtor is not an individual.

shoes and succeeds only to the debtor's interests in property. *The Mediators, Inc. v. Manney (In re The Mediators, Inc.)*, 105 F.3d 822, 825-826 (2nd Cir. 1997); *Hays and Company v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1153 (3rd. Cir. 1989); *Sender v. Simon*, 84 F.3d 1299, 1305 (10th Cir. 1996); *Angeles Real Estate Company v. Kerxton (In re Construction General, Inc.)*, 737 F.2d 416, 418 (4th Cir. 1984) [(I)f the bankrupt's title in property is limited, the trustee receives no greater interest]. While the Trustee is entitled to have invalid claims disallowed, he is nevertheless obligated for valid claims the same as the debtor was.

Valid property rights existing before bankruptcy in persons other than the bankrupt must be recognized and respected in bankruptcy. *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132, 135-138 (1962). A tax lien is a property right entitled to recognition in bankruptcy. *Johnson v. Home State Bank*, 501 U.S. at 85.

In deciding cases before it in which state receivers claimed excessive rights in the property of others, Michigan courts have long relied on the tenet that a trustee takes property of the estate not as an innocent purchaser but subject to all valid claims, liens and equities. *Kalamazoo Trust Co. v. Merrill*, 159 Mich. 649, 656, 124 N.W. 597, 600 (1910). The Court quoted at length from Collier on Bankruptcy and listed a number of federal decisions on which it relied for its analysis:

> "It is well settled that a trustee takes, not as an innocent purchaser, but subject to all valid claims, liens, and equities. Thus he has no better title than the bankrupt has, and is affected with every equity which would affect the bankrupt himself if he were asserting the same rights and interest. A trustee in bankruptcy stands in the shoes of the bankrupt, and has no better title than he, in the absence of fraud, or of attaching or judgment

> creditors at the time of the filing of the petition. Where a right of action passes to the trustee, any defense, legal or equitable, which might have been raised against the bankrupt's claim may be raised against the trustee."

This observation of the Michigan Supreme Court almost a century ago has the same significance and worth today as it did then. The trustee has no greater rights in property than a bankrupt.

The passage also recognizes that where fraud is involved, while a trustee may have greater rights than the debtor to regain property, he will have no greater right in the property recovered than the debtor originally had. The legislative history to 11 U.S.C. § 541 confirms the continuing validity of this principle. "The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action . . . and all other forms of property currently specified in section 70a of the Bankruptcy Act." H.R. Rep. No. 95-595 to accompany H.R. 8200, at 367-369 (1977).

Section 70a of the Bankruptcy Act included the trustee's avoidance powers. 11 U.S.C. § 110 (repealed). The legislative history of the current Code further indicates that although section 541(a) is an "all-embracing" definition of estate property, only the debtor's interest in property becomes property of the estate. *Id.*

In direct contravention of these principles, the Sixth Circuit's ruling permits an insolvent debtor to transfer property to an unsecured creditor to defeat the attachment of a tax lien when the recovered property returns to the estate upon the trustee's avoidance of the wrongful transfer. To support this result, the Court reasons that recoveries of a preference action cannot be subject to a pre-petition lien because they flow from

a post-petition "chose in action" and amount to property acquired post-petition.

The reasoning confuses the right to recovery with the property actually recovered. It is entirely possible for a creditor to have no rights in a cause of action and to have every right to assert a security interest in what the estate receives. *In re Figearo*, 79 B.R. 914, 918 (D. Nevada, 1987) (involving a fraudulent transfer, which differs from a preferential transfer materially only in the element of intent).

3. Bankruptcy is a collective proceeding with one representative acting in a fiduciary capacity for all creditors.

Beyond *Figearo*, the basis for preserving the lien in the recoveries from avoidance actions is the nature of the bankruptcy proceeding itself. Bankruptcy is a collective proceeding. All collective proceedings operate through a representative that possesses rights of action that no single beneficiary can exercise. The funds, proceeds, recoveries or damages from the action are for the beneficiaries of the trust or estate, to be apportioned according to established entitlements.

Several circuit courts of appeal have discussed the collective nature of the bankruptcy process. The Court of Appeals for the Seventh Circuit commented in *American Reserve Corp. v. Huddleston (In re American Reserve Corp.)*, 840 F.2d 487, 489 (7th Cir. 1988):

> (T)he principal function of bankruptcy law is to determine and implement in a single proceeding the entitlements of all concerned. . . . When there is not enough to go around, the bankruptcy judge must establish priorities and apportion assets among creditors with the same priority, but the

> starting point is the legal entitlements that exist outside of bankruptcy. (Citations omitted).

In a later case the Seventh Circuit observed that "(c)ollective proceedings permit a more orderly distribution, preserving a debtor's going concern value (if there is any). By providing for the recapture of last-minute payments to creditors, the preference-recovery provisions reduce the incentive to participate in asset-grabbing." *Covey v. Commercial Nat. Bank of Peoria*, 960 F.2d 657, 661-662 (7th Cir. 1992).

The Ninth Circuit expressed agreement with the above principles in *Rosner v. Worcester (In re Worcester)*, 811 F.2d 1224, 1228 (9th Cir. 1987, as did the Tenth Circuit in *Osborn v. Durant Bank & Trust Company (In Re Osborn)*, 24 F.3d 1199, 1203 (10th Cir. 1994).

In a controversial decision, the Seventh Circuit viewed the avoidance powers as "essential to make the bankruptcy case a collective proceeding for the determination and payment of debts." *Levit v. Ingersoll Rand Financial Corporation*, 874 F.2d at 1194. The Court summed up the substance and purpose of preference law thus: "Payments out of the ordinary course in the 90 days before filing a bankruptcy petition may be recovered for the estate under §§ 547 and 550. Creditors then receive shares determined by statutory priorities and contractual entitlements rather than by their ability to sneak in under the wire." *Levit*, 874 F.2d at 1188. See also, Vern Countryman, *The Concept of A Voidable Preference in Bankruptcy*, 38 Vanderbilt L. Rev. 713, 715 (1985) (remarking on the historical developments toward the collective administration of an estate that ultimately remedies pre-administration transfers that "frustrate [a] prescribed order of distribution").

Hence, under *Levit* and the history of the preference, a valid tax lien would be recognized and accorded priority status over a general unsecured claim.

To restate, bankruptcy, as a collective proceeding, operates through the trustee who, under statutory avoidance powers, possesses rights of action that no single beneficiary to the estate can exercise. But the recoveries are for the estate with all its encumbrances, not for a special fund for general unsecured creditors.

In summary, the principle that the trustee stands in the shoes of the debtor is a generally accepted characterization of the trustee's relationship to the debtor and to the debtor's estate. As a related principle, the collective process protects rights established in property before bankruptcy and is also a generally accepted bankruptcy principle. The dichotomy of ownership (dual entity) is not generally accepted. In addition, the phrases "bankrupt's estate" or "debtor's estate," which appear in countless federal cases, sufficiently signify that a bankruptcy estate has no life of its own totally independent of the "grantor" of its property.

The UA does not dispute that a debtor and an estate are distinct legal entities. The dispute is that some courts, as Collier put it, make too much of the distinction.

Casting preference recoveries as "after-acquired" property also distorts the distribution process the Code sets forth. The Trustee here takes the position that preference recoveries are "after-acquired" property to which a lien cannot attach. "After acquired property" has a special meaning in security agreements under the Uniform Commercial Code. Preferences are not after-acquired property but are simply the recaptured interests of a debtor in property. *Begier v. Internal Revenue Service*, 496 U.S. 53, 58-59 (1990). *Begier* views preferences under 11 U.S.C. § 541(a)(1) as property interests a

debtor has at the commencement of a case. Thus, preferences are an interest in property that a debtor owned pre-petition, or property that would have been owned at the commencement of the case, had the debtor not made preference payments to unsecured creditors.

In short, based on the cases discussed above, when preference recoveries are returned to a chapter 7 estate, a continuing statutory lien on estate property must be viewed as either affixed to the property because the lien followed the property or as re-attaching by operation of law since perfection of properly recorded liens continues through bankruptcy.

4. The purpose of a preference action is to restore assets to the estate for orderly distribution under the priority plan of the Code.

The last critical error the Courts below made is endorsing the "equality of distribution" premise, in which the Bankruptcy Court justified the creation of a special fund through the preference avoidance power, to redirect estate assets from a valid lien to an unsecured creditors' pool. To launch its presentation on the Code's creation of a fund for general unsecured creditors, the Bankruptcy Court opinion quotes a passage from Collier that describes the rationale behind the preference section. (App. 26a-27a). The passage speaks to "equality of distribution among creditors of the debtor" as an aim of preference policy.

The Court proceeds to explain that the interplay between 11 U.S.C. § 724 and 11 U.S.C. § 551 will prevent distribution to the UA because the Court found that no lien existed with respect to preference recoveries. Section 724 outlines the distribution of assets with respect to valid tax liens. Section 551 provides that avoided transfers are "preserved for the estate." App. 27a-28a.

The Court *sub silentio* holds that the UA's tax lien on preference recoveries is an avoided lien preserved for the benefit of the estate. Thus, it rules that the UA, as a general unsecured creditor, must share equally in the distribution of the estate corpus with the remaining general creditors of the estate. As noted earlier, the Trustee did not dispute the validity of the UA's lien outside of bankruptcy.

Throughout these proceedings, the UA suggested that the Trustee was advocating, and that the Court was granting, the avoidance of the UA's lien, but neither the Trustee nor the Court recognized that a valid tax lien must, by definition, attach to all estate assets described in the lien statute. The UA contends that the only way to avoid satisfying the lien is to avoid the lien through the bankruptcy avoidance powers. The Trustee here has taken no action to avoid the tax lien under any of the avoidance powers. None of the avoidance actions already pursued can, in tandem, simultaneously avoid interests in other valid liens.

In arguing that the Bankruptcy Court should equalize distribution here, the Trustee offered the myth that the over-riding policy of preference law is "equal distribution for all creditors." Countryman, however, has outlined the reality about the purposes and policies behind preference law:

> Statements in the legislative history also mention preserving the bankruptcy policy of "equality" of distribution. But, with creditors classified for distribution purposes on the basis of liens and priorities, no bankruptcy policy of "equality" exists. A policy of preserving classes and of preserving equality within classes does exist, however, and the preference concept is designed to preserve this policy. The function of the preference concept is to avoid prebankruptcy

> transfers that distort the bankruptcy policy of distribution. Transfers that do distort this policy do so without regard to the state of mind of either the debtor or the preferred creditor. Countryman, *supra*, 38 Vanderbilt L. Rev. at 748.

For a similar view from a commentator calling for reform of the prior Bankruptcy Act, see Robert C. Morris, *Bankruptcy Law Reform: Preferences, Secret Liens and Floating Liens*, 54 Minn. L. Rev. 737, 738-739 (1970). It is clear from the views of these commentators that proving attachment to a preference recovery is neither necessary nor desirable. Because a lien attaches before bankruptcy, it is presumed to attach to the recovery of the asset for the estate.

Bankruptcy commentators have further observed that it is axiomatic that preference law exempts fully secured creditors from its grasp. Jackson, *Avoiding Powers in Bankruptcy*, 36 Stan. L. Rev. 725, 768 (1984). This is so because in receiving a "preferential payment" the secured creditor "does not receive any more than such creditor would receive in liquidation under the Code." *Young v. Republic National Factors Corp., (Matter of Lucasa International, Ltd.)*, 13 B.R. 600, 605 (Bankr. S.D. N.Y. 1981). *Robinson v. United States v. S.C. Employment Security Comm. (In re Carolina Resort Motels, Inc.)*, 51 B.R. 447, 451 (Bankr. S.D. S.C. 1985). The UA has discussed the possible consequences of its receipt of a preferential transfer as a secured creditor *supra* at pages 9-10.

In this connection, the legislative history to 11 U.S.C. § 547 states that "the final element [of the preferential transfer cause of action] changes the application of the greater percentage test from that employed under current law. Under this language, the court must focus on the relative distribution between classes as well as the amount that will be received by the members of the class of which the preferree is a member." H.R. Rep. No. 95-595 to accompany H.R. 8200, at 372, (1977).

Recognizing the real purposes of the preference section, the Tenth Circuit, in *Citicorp Acceptance Company, Inc. v. Robison (In re Sweetwater)*, 884 F.2d 1323, 1327 (10th Cir. 1989), has articulated that while a primary concern of avoidance actions is whether successful recovery will benefit unsecured creditors, it also stated that the purpose of a preference action is "to return assets to the debtor's estate for equitable distribution to all creditors." (Emphasis added). Id. at 1328. The court noted also that *Delgado Oil Co. v. Torres*, 785 F.2d 857 (10th Cir. 1986), and *Texas General Petroleum Corp. v. Evans (In re Texas General Petroleum Corp.)*, 58 B.R. 357 (Bankr. S.D. Tex. 1986), "reaffirm the principle that post-petition avoidance actions should be pursued in a manner that will satisfy the basic bankruptcy purpose of treating all similarly situated creditors alike." (Emphasis added). *Id.* at 1328.

Sweetwater recognized that chapter 11 reorganization plans must treat similarly situated creditors alike (unless a particular creditor agrees to different treatment). *Id.* at 1328-1329. Likewise, chapter 7 asset distribution requires that creditors are paid according to their classification with others of the same class. A lien creditor is not "similarly situated" with a general creditor.

The history of the voidable preference is also relevant to the question presented. Lengthy articles have been devoted to the development of the body of preference law. But two brief paragraphs will sketch the salient relevancies.

"The concept of the voidable preference is purely a statutory creation." Vern Countryman, *The Use of State Law in Bankruptcy Cases (Part II)*, 47 N.Y.U. Law R. 631 (1972). While some states have enacted preference statutes and while a trustee may invoke a state preference statute under his avoiding powers, when a trustee invokes section 60 (under the

Bankruptcy Act), now section 547, he does not rely on state preference statutes. Countryman, *supra* at 632.

Since a preference is a statutory creation, it exists in derogation of the common law. It is, in most jurisdictions, not illegal to prefer one creditor to another in payment. It is ethically and commercially acceptable for a debtor to pay anyone that he owes a debt. But in the world of bankruptcy, a preference is a wrongful statutory transfer that may be undone. In undoing the transfer, the estate is restored for a more orderly distribution of assets, as prescribed by Congress. *See generally*, Countryman, *supra*.

In his complaint against the UA, the Trustee alleged that "the MUA claims that under 11 U.S.C. § 552 its liens attached to the recovered preference proceeds" that the Trustee holds. The UA denied the allegation and flatly stated that 11 U.S.C. § 552 does not apply to non-consensual liens. In his motion for summary judgment, the Trustee re-alleged the claim and then averred that "preference proceeds are not proceeds of the [UA's] collateral within the meaning of § 552 because such a cause of action can only be pursued by a Trustee (emphasis added)." The fallacy in this allegation is that a tax lien attaches to collateral. It does not. A tax lien attaches to property interests.

When a consensual lienor enters into a security agreement and files a financing statement to make a public record of its agreement to loan money or extend credit, it must list the collateral in which the lienor has an interest. The security agreement is a bargain, and the borrower makes a pledge of property to guarantee the obligation. The lender gets a pledge before it makes a loan and is able to adjust its commitment with regard to its potential bad debt risks. The unsecured creditor also has bargaining options. It can make the cost of extending credit greater and can refuse to deal with a debtor to reduce its bad debt risk.

The tax creditor, on the other hand, performs without a pledge of collateral. The nonconsensual creditor cannot refuse to deal with the debtor and cannot reduce its bad debt risk. Instead of an agreement, a statute describes the property bound by the tax lien. The statute will be generally all-inclusive, but the tax creditor is nevertheless at high risk because a debtor will probably have encumbered most of its property before the tax lien arises. As is observed in an article in The Tax Lawyer, the fact that tax creditors are not a part of the "creditors' bargain" puts the IRS (and other tax agencies) at a distributional disadvantage in bankruptcy. "The creditors' bargain becomes an agreement among consensual secured creditors that other creditors should receive less inside bankruptcy than they would outside." Francis R. Hill, *Toward a Theory of Bankruptcy Tax: A Statutory Coordination Approach*, 50 Tax Lawyer 103, 112 (1996).

But Congress's decision to protect the reach of valid statutory liens in bankruptcy to property that the estate acquires, which the consensual lienor may have reached before the bankruptcy filing but cannot reach under section 552, levels out the playing field for the tax collector in the debtor-creditor commercial world. "[T]he reasonable classification of claims as entitled to priority because of superior equities may be the subject of determination by Congress in providing for the distribution of assets in bankruptcy proceedings." *Carpenter v. Wabash Ry. Co.*, 309 U.S. at 28.

Cases with a *per se* holding that a tax lien attaches to preference recoveries are scarce. One court, in a published opinion, has ruled that the tax lien creditor is entitled to share in preference recoveries. *In re Ferguson*, 197 B.R. 161 (Bankr. S.D. Fla. 1996). *Ferguson* is significant because the court recognized that a tax lien created under statutory mandate intrinsically attaches to property. The court held:

> (T)he Federal Tax Lien attaches to the Preference Action recovery obtained by the Trustee for the Benefit of the Bankruptcy Estate. The federal tax lien attaches to all property and rights to property belonging to the debtor as of the date the bankruptcy petition is filed . . . . Under 11 U.S.C. § 506(a), the tax claim is secured to the extent of the value of the collateral[3] which secures its claim. See also 11 U.S.C. § 506(d). In valuing the secured claim, all estate property must be considered including property recovered by way of preference actions by the trustee. (Citations omitted). 197 B.R. at 164.

The *Ferguson* Court understood that preference recoveries exist on the date of filing and have value for the type of secured claim here, a perfected statutory lien.

In refusing to acknowledge *Ferguson* and in rejecting *In re National Financial Alternatives, Inc.*, 96 B.R. 884 (Bankr. N.D. Ill. 1989), the Sixth Circuit's decision relied instead on *In re Southeast Railroad Contractors, Inc*, 235 B.R. 619 (Bankr. E.D. Tenn. 1996). (App. 14a-17a). *Southeast* concluded that the debtor had no interest in preference recoveries so the tax lien could not attach. But the debtor really had no equity interest in such property before the preferential transfer that was ultimately avoided because the tax lien had already attached to that property the moment the debtor first acquired it. The debtor gave away, through the preferential transfer, that which did not actually belong to it in the first place.

Southeast erred in numerous policy calls. *Southeast* ruled that because the recovery of preferences is for the "benefit of the estate," the federal tax lien did not extend to

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[3] In reference to secured tax claims, "collateral" must be understood to mean property.

them. As already pointed out, all assets in an estate are subject to prior equities. *Southeast* also ruled that a trustee's preference recoveries cannot be characterized as property "belonging to the debtor." It concluded, therefore, that because the recoveries existed as only post-petition property, the IRS lien could not encumber them. The fallacy of this pronouncement is twofold: (1) The very term "preference recovery" suggests that the res existed before--or it could not be recovered. (2) No provision in the Code prevents the lien from reaching property that the estate acquires, all of which must be property in which the debtor had an interest in the first place since a bankruptcy court cannot allow distribution of another person's property in a particular debtor's case.

Southeast also applied principles that guide the functioning of collateral pledged to a secured creditor to property reached by a tax lien under a statute. First, the Code clearly distinguishes between consensual liens and statutory liens. Second, each type of lien is subject to a different body of law outside of bankruptcy--most consensual liens to the Uniform Commercial Code and tax liens to the statutes creating them. Further, the term, "collateral," as defined in Black's Law Dictionary is "property which is pledged as security for the satisfaction of a debt." Black's Law Dictionary 261 (6th ed. 1990). A tax lien attaches to property by operation of law, not to collateral by operation of an agreement.

In *Southeast*, the court applied a tracing principle governing "collateral" to preference recoveries, subjecting the IRS to the requirement to "establish that it has a lien on the very moneys now in the hands of the trustee." The tracing requirement is not relevant in recovering property through avoidance actions since the trustee may acquire the actual property transferred or, if the court so orders, the value of such property. 11 U.S.C. § 550(a). If the very moneys transferred are not the very moneys returned to the trustee, it does not

matter. The preference avoidance action avoids the infirmities created for innocent creditors because of the wrongful transfer.

National Financial Alternatives and *Ferguson* are consistent with the aims and purposes of bankruptcy policy in recognizing the time-honored aims of preference law and the place of the tax lien claim in the Code's plan for the distribution of estate assets. *Southeast* is not.

The result that the Sixth Circuit supports in redistributing the preferential transfer recoveries here, in reliance on the District Court's endorsement of *Southeast*, is incongruous with the pre-bankruptcy rights of the parties in this case. The decision sets the stage to create a super-class of general unsecured creditors through resourceful causes of action that neither past bankruptcy law or Congressional enactments have authorized nor intended. The purpose of the avoidance powers is to restore an estate to its pre-bankruptcy status, not to reorder priorities. This, Congress has done in specific provisions of the Code. The Court's decision both contravenes bankruptcy's aims and purposes and wholly undermines long-established protections that the Bankruptcy Code still grants to non-consensual creditors, the public fisc and the sovereign power to tax--notwithstanding historical changes by which tax creditors are treated procedurally like other creditors.

Finally, a recent decision of this Court touched on the allowance of claims and distribution of assets, stating in *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 16 (2000):

> And although *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 67 S. Ct. 237, 91 L. Ed. 162, suggested that "allowance" of claims is a federal matter, that case concerned distribution of assets, not the validity of claims in the first instance, which, *Vanston* specifically

> states, is to be determined by reference to state law, *id.*, at 161, 67 S. Ct. 237.

Under the standard set out above, the tax claim here is valid under non-bankruptcy law and should be allowed as a secured tax claim. *See also*, *Butner v. United States*, 440 U.S. 48, 55 (1978).

The distribution of assets, as a federal matter, is governed under 11 U.S.C. § 724. Contrary to the Trustee's arguments, there is no preference distribution policy in bankruptcy that reserves preferences for general unsecured creditors. The policy is quite the opposite. Preferences are recaptured from preferential transferees to be redistributed as outlined in the Code. Indeed, if the assets here are to be distributed to unsecured creditors, the Trustee will by-pass 11 U.S.C. § 724, which describes the distribution of assets subject to an unavoidable tax lien.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October, 2001

APPENDIX

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(252 F.2d 852)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: THOMPSON BOAT COMPANY,
Debtor.

No. 00-1233

RANDALL L. FRANK, TRUSTEE,
Plaintiff-Appellee,

v.

MICHIGAN STATE
UNEMPLOYMENT AGENCY,
Department of Consumer &
Industry Services,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Michigan at Bay City.
No. 99-10333 - Victoria A. Roberts, District Judge.

Argued: April 24, 2001

Decided and Filed: June 6, 2001

Before: RYAN and BATCHELDER, Circuit Judges; MATIA,
Chief District Judge. [1]

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[1] The Honorable Paul R. Matia, Chief United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

ARGUED: Donna K. Welch, OFFICE OF THE ATTORNEY GENERAL, Detroit, Michigan, for Appellant.
Henry L. Knier, Jr., LAMBERT, LESER, GIUNTA, COOK & SCHMIDT, Bay City, Michigan, for Appellee.
ON BRIEF: Donna K. Welch, OFFICE OF THE ATTORNEY GENERAL, Detroit, Michigan, for Appellant.
Henry L. Knier, Jr., LAMBERT, LESER, GIUNTA, COOK & SCHMIDT, Bay City, Michigan, for Appellee.

OPINION

RYAN, Circuit Judge. The Michigan State Unemployment Agency (UA) appeals the district court's judgment affirming the decision of the bankruptcy court. The district court concluded that the UA's pre-petition liens on property of the Thompson Boat Company, the bankruptcy debtor, did not reattach to post-petition preference proceeds recovered by a bankruptcy trustee. We will affirm.

I.

On May 19, 1993, Thompson filed a Chapter 11 petition in federal bankruptcy court. The debtor's case was subsequently converted to an action under Chapter 7 of the Bankruptcy Code with Randall L. Frank, the plaintiff in the present case, as the trustee of Thompson's Chapter 7 estate.

There is no dispute that the UA filed a statutory tax lien on Thompson's property for past due unemployment taxes in the Saginaw County Register of Deeds office and with the Michigan Secretary of State, in the amount of $232,825.25.

When Thompson's case was converted to a Chapter 7 action, the UA properly filed an amended claim in the bankruptcy court. The issue in this case is whether the UA's lien extends to the proceeds, totaling over $300,000, recovered by the trustee, Frank, when he initiated preference actions against Thompson's other creditors.

The UA argues that Frank "stands in the shoes" of Thompson, and, therefore, any property recovered by him in his capacity as trustee is subject to existing statutory liens on Thompson's property. Frank argues that the UA's lien never attached to the preference proceeds because the proceeds are not property of the debtor subject to the statutory lien, but instead are property of the estate to be distributed to Thompson's creditors under the provisions of the Bankruptcy Code.

The bankruptcy court granted Frank's motion for partial summary judgment after concluding that (1) a debtor and his estate are two separate entities; and (2) the Bankruptcy Code allows only a trustee, not debtors, to initiate a preference action to avoid certain transfers, so proceeds recovered are property of the bankruptcy estate, not the debtor. The bankruptcy court stated that while the UA had a statutory lien on the debtor's property, that lien did not also attach to property acquired by the estate after a bankruptcy petition had been filed. The district court reviewed the bankruptcy court's judgment under a *de novo* standard and affirmed its decision. The UA filed a timely appeal to this court.

II.

In an appeal from a bankruptcy court, this court reviews the bankruptcy court's findings of fact for clear error and the district court's legal conclusions *de novo*. *In re Highland Superstores, Inc.*, 154 F.3d 573, 576 (6th Cir. 1998). In this case both parties agree that the issue is a purely legal question.

III.

The Honorable Victoria A. Roberts, United States District Judge, prepared a well-reasoned opinion that thoroughly discusses and analyzes each issue presented in this case. Because we cannot improve upon the reasoning in Judge Roberts's excellent opinion and her conclusion that the UA's pre-petition liens do not reattach by operation of law to proceeds recovered by the bankruptcy trustee in post-petition preference actions, we adopt Judge Roberts's opinion as our own.

Accordingly, we **AFFIRM** the judgment of the district court.

Case No: 00-1233

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

In re: THOMPSON BOAT COMPANY
Debtor

Filed
Jul 11 2001
Leonard Green
Clerk

RANDALL L. FRANK, Trustee

Plaintiff - Appellee

v.

MICHIGAN SATE UNEMPLOYMENT AGENCY,
DEPARTMENT OF CONSUMER INDUSTRY SERVICES

Defendant - Appellant

BEFORE: RYAN and BATCHELDER, Circuit Judges;
MATIA, Chief District Judge.

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

Case No: 00-1233

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

In re: THOMPSON BOAT COMPANY
Debtor

Filed
Jul 30 2001
Leonard Green
Clerk

RANDALL L. FRANK, Trustee

Plaintiff - Appellee

v.

MICHIGAN SATE UNEMPLOYMENT AGENCY,
DEPARTMENT OF CONSUMER INDUSTRY SERVICES

Defendant - Appellant

BEFORE: RYAN and BATCHELDER, Circuit Judges; MATIA, Chief District Judge.*

Upon consideration of the motion filed by the appellant to stay the mandate pending the file of a Petition for Writ of Certiorari,

It is **ORDERED** that the motion be, and it hereby is, **GRANTED**. The mandate is stayed for 90 days from this Order unless the Court is advised that the petition for Writ of Certiorari has been filed.

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* The Honorable Paul R. Matia, Chief United States District Judge for the Northern District of Ohio, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

(261 B.R. 909)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

RANDALL L. FRANK,
Plaintiff/Appellee,

v. No. 99-10333

STATE OF MICHIGAN,
acting through the MICHIGAN
UNEMPLOYMENT AGENCY
DEPARTMENT OF CONSUMER
& INDUSTRY SERVICES,
Defendant/Appellant.

OPINION AND ORDER AFFIRMING DECISION OF BANKRUPTCY COURT

Victoria A. Roberts, District Judge.

I.

This matter is before the Court on an appeal by the State of Michigan Unemployment Agency ("Appellant" or "UA") from a decision by the Bankruptcy Court ("BC"). The central issue is whether the BC erred in concluding that the UA's pre-petition liens on Debtor's property do not attach to preference proceeds recovered by Trustee post-petition. For the reasons explained below, the Court **AFFIRMS** the decision.

II.

Thompson Boat Co. ("Debtor") filed a Chapter 11 petition on May 19, 1993. The case was converted to Chapter 7 on August 19, 1994. Randall L. Frank ("Trustee") is the trustee of the Chapter 7 estate.

Prior to Debtor filing its bankruptcy petition, the UA had filed certain tax liens, pursuant to the Michigan Employment Security Act ("MESA"), M.C.L. § 421.15(e), for past due unemployment taxes in the Saginaw County Register of Deeds and the Michigan Secretary of State. After the Chapter 11 case was filed, Appellant filed a claim on September 22, 1993, for Debtor's unpaid unemployment contributions. When the case was converted, Appellant also filed an amended claim.

Upon conversion to Chapter 7, Trustee commenced a number of preference actions against Debtor's creditors. In so doing, Trustee recovered over $300,000.00. Thereafter, trustee filed an Adversary Complaint to determine the validity and extent of Appellant's liens. In Count II, Trustee alleged that the preference proceeds recovered constitute post-petition property of the estate and are not subject to the UA's pre-petition liens. Trustee argued that, since only a trustee can bring a preference action, the UA could never have recovered the funds on its own, and the liens could not have attached to that property.[2] The UA responded that the Bankruptcy Code only prevents security interests from attaching to property acquired post-petition, and that it does not prevent statutory liens from so doing. It claimed that under the applicable

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[2] Count I of the Complaint alleged that the liens were not properly perfected.

Michigan law, its liens attach and continue to attach to all property of an employer until the tax is paid.

Trustee then filed a Motion for Summary Judgment as to Count II, asking the BC to find that: (1) the automatic stay provisions of the Bankruptcy Code prevented all liens from attaching post-petition to the recovered preference proceeds; (2) proceeds recovered as a result of a preference action are not proceeds of the UA's collateral within the meaning of the Code's provision allowing attachment in certain situations; and (3) the recovered preference proceeds are post-petition property of the estate which do not arise out of any of the secured creditor's collateral, and are preserved for equal distribution to all creditors.

The UA responded to the Motion, requesting the BC to rule that the perfected statutory liens attach to the preference proceeds. The UA took the position that Trustee could not avoid its liens under the relevant provisions of the Code and, therefore, the lien was perfected in property acquired post-petition. In other words, the UA claimed that any property acquired by the estate is subject to pre-petition encumbrances of record. It further claimed that the Code's distribution scheme provides for the satisfaction of allowed claims secured by tax liens.

Trustee responded, claiming that the issue was not whether the liens were valid, but whether they attached to the post-petition preference proceeds. According to Trustee, the UA could not have encumbered these proceeds because these proceeds (and, in particular, the right to recover them) did not exist before the filing of the petition which gave Trustee the right to avoid preferences. At oral argument, when the UA claimed that Trustee was essentially seeking to impermissibly avoid a lien, the BC responded as follows:

> [Trustee is] not saying, "[Y]ou have a lien but we can set it aside as a preference or we can set it aside as a fraudulent transfer, [Trustee] is simply saying you don't have a lien on this asset because your statutory lien does not attach to assets that the trustee produces through the exercise of his Chapter 5 rights. So this is not an avoidance action. They don't give you that much. In order to have an avoidance action, they'd have to assume that you do have a lien and agree that you do. They're saying you don't and never did have a lien.

On August 5, 1999, the BC issued an opinion granting Trustee's Motion for Summary Judgment on Count II. The BC reasoned that Debtor and the estate are separate entities. At the same time, the preference provisions allow only Trustee, not Debtor, to avoid certain transfers, and the proceeds are recovered on behalf of the estate, not Debtor. According to the BC, since the statutory liens only attach to property of the employer, who is Debtor here, the liens do not reach post-petition property acquired by the estate. In other words, since Debtor did not "own" the right to pursue a preference action, the statutory liens could not be extended to attach to the proceeds recovered by such action.

The UA now appeals that decision.

III.

The sole issue presented in this appeal is whether the BC erred in concluding that Appellant's pre-petition liens do not attach to proceeds recovered by Trustee as a result of post-petition preference actions. Both parties agree that the issue presents a purely legal question. As such, this Court's review is de novo. See In re Baker & Getty Financial Services, Inc., 106 F.3d 1255, 1259 (6th Cir.1997) ("The district court then

reviews the bankruptcy court's findings of fact for clear error and the bankruptcy court's conclusions of law de novo."). Upon de novo review, this Court concludes that the BC did not commit an error of law, and, therefore, affirms the decision.

The Court agrees that the estate/debtor dichotomy applies to the preference provisions, thereby barring attachment of the proceeds by pre-petition liens. The distinct nature of the two entities has been previously recognized. For example, in In re Winom Tool & Die, Inc., 173 B.R. 613 (Bankr.E.D.Mich.1994), the court reasoned that in the absence of a trustee the debtor will act as the debtor in possession, but the debtor's identity is not completely merged into that of the debtor in possession. As such, "property interests may be held by the post-petition debtor in its own right (non-estate property) or as debtor in possession (estate property)." Id.

Admittedly, courts have disagreed as to the circumstances in which this dual entity concept is applicable. For example, courts in this district have found that the distinction even applies to the mutuality set-off provisions of 11 U.S.C. § 553.[3] In re Walat Farms, Inc., 69 B.R. 529, 530 (Bankr.E.D.Mich.1987), while others find otherwise. Additionally, the Supreme Court, when discussing enforceability of collective bargaining agreements against a debtor-in-possession under Chapter 11, cast some doubt on the validity of the distinction, stating:

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[3] 11 U.S. C. § 553 preserves a creditor's right to offset mutual obligations between it and a debtor. To establish a right of setoff, the creditor must generally demonstrate:

1. A debt exists from the creditor to the debtor and that debt arose prior to the commencement of the bankruptcy case.
2. The creditor has a claim against the debtor which arose prior to the commencement of the bankruptcy case.
3. The debt and the claim are mutual obligations.

Braniff Airways, Inc. v. Exxon Co., U.S.A., 814 F.2d 1030, 1035 (5th Cir.1987) (quotation omitted).

> Obviously if the latter were a wholly "new entity," it would be unnecessary for the Bankruptcy Code to allow it to reject executory contracts [under 11 U.S.C. § 365], since it would not be bound by such contracts in the first place. For our purposes, it is sensible to view the debtor-in-possession as the same "entity" which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing.

NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984). Nonetheless, there is no good reason to disturb the debtor/trustee dichotomy in this particular context.

First of all, Appellant does not show that any court has ever rejected its application in the context of preference actions by a trustee. Moreover, courts interpreting Bildisco completely disagree about its effect on the dual entity theory. Some courts have specifically rejected the theory altogether, see e.g., In re Ontario Locomotive & Indus. Ry. Supplies, 126 B.R. 146, 147 (Bankr.W.D.N.Y.1991) (stating that Bildisco "would appear to have laid to rest the 'separate entity' doctrine for all time"), while others have concluded that Bildisco is limited to the context in which it arose. Indeed, the court in Patton v. John Deere Co. (In re Durham), 87 B.R. 300, 302 (Bankr.D.Del.1988), stated that Bildisco merely declared that "for the purposes of § 365"[4] a debtor-in-possession is not a new entity. However, the court declined to reject the

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[4] 11 U.S.C. § 365 governs the extent to which a trustee may assume or reject an executory contract or unexpired lease of the debtor.

dichotomy in a 11 U.S.C. § 552(b)[5] case, reasoning: "[T]he Code creates upon the filing of a case an estate composed of all property in which a debtor had a legal or equitable interest. The estate is a new entity." 87 B.R. at 302. Given the clear conflict of interpretation, Appellant's claim that the duality concept does not apply is not persuasive.

Further, the BC's opinion contains a well-reasoned analysis as to why the dichotomy should not be rejected in the context of the avoidance of preference transfers. As the BC points out, the power to avoid is specifically given to Trustee, rather than Debtor. Moreover, a review of other provisions of the Code reveals that when the legislature intended to give powers to a debtor, it knew how to do so. See e.g., 11 U.S.C. § 522(h) ("The debtor may avoid a transfer of the property of the debtor if . . ."). As such, the Court can infer that Congress did not intend for the power to avoid preferences to belong to Debtor in the first instance. Moreover, the Code makes clear that debtors have no interest in the proceeds recovered from preference actions, as any transfers avoided are "preserved for the benefit of the estate . . . ." 11 U.S.C. § 551. As such, sound principles of statutory interpretation support the application of the dual entity theory in this context.

In so concluding, the Court further finds that the BC reasonably rejected the reasoning of Southwest Equipment, 1993 Bankr.LEXIS 1554 (Bankr.E.D. Tenn. Oct. 12 1993). As an initial matter the court in Southwest found only that 11 U.S.C. § 552(a)[6] allows an IRS tax lien to attach to post-

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[5] 11 U.S.C. § 552(b) generally specifies that if a security agreement entered into before the commencement of a bankruptcy case creates a security interest in property of the debtor which extends, inter alia, to proceeds, then that security interest extends to proceeds acquired by the estate after the commencement of the case to the extent provided by the agreement and by applicable non-bankruptcy law.

[6] 11 U.S.C. § 552(a) generally provides that property acquired by the estate or the debtor post-petition is not subject to pre-petition security interests.

petition recoveries by a trustee; it did not consider the issue of whether preference recoveries by a trustee can constitute the property of a debtor taxpayer, attachable by such liens. Likewise, the case of National Financial, 96 B.R 844 (Bankr. N.D. Ill. 1989), relied on by Southwest, is also distinguishable for its failure to address preference transfers. Finally, and most important, the Southwest court has since held that preference recoveries do not constitute property "belonging" to the debtor-tax-payer and thus, IRS liens do not cover preference recoveries. In re Southeast Railroad, 235 B.R. 619 (Bankr. E.D. Tenn. 1996).

The Southeast court, analyzing a federal tax lien analogous to the one at issue here, noted that lien reached all property of the taxpayer, whether real, or personal. 235 B.R. at 621. However, the court also noted that the lien attached only to property that belonged to the taxpayer,--i.e., to the taxpayer's interest in the property. It reasoned: "If then, the attachment of the . . . lien is limited to property belonging to the taxpayer, the tax lien cannot attach for the first time to the preference recoveries in this case because they do not 'belong' to the debtor. It has no interest in them." Id. at 622. Noting that the power to avoid preference is unique to the trustee and for the benefit of the estate, the court concluded that the recovery could never be characterized as an asset or property of the debtor. Id.

Further, although the court recognized that non-consensual tax liens are not cut off by 11 U.S.C. § 552(a), once the lien is challenged, the burden of establishing its validity rests with the party claiming it. "Thus, in order to prevail, the IRS must establish that it has a lien on the very moneys now in the hands of the trustee." Id. In other words, it would have to show that "the preference recovery moneys were the very same moneys transferred by the debtor to the initial transferee. . . ." Id. at 623. However, the court found that the fungibility of money

and commingling problems beclouded the identity of the money, and concluded that the IRS did not meet its burden. Id.

Finally, the court observed that the majority of courts considering a similar question have found that "preference actions are unique bankruptcy devices designed specially to increase the dividend for unsecured creditors and that therefore secured creditors, even those with rights in the proceeds, can have no interest in a trustee's preference recovery."[7] Id. Recognizing that these cases were decided under 11 U.S.C. § 552, the court reasoned that they nonetheless illustrated a judicial reluctance to find that preference recoveries are in some way the proceeds of the debtor's property." Id. at 624.

In short, the Court rejects Appellant's attempt to apply Southwest and or National Financial, supra. Rather, because the Southeast case is on point and well-reasoned, the Court follows it. As such, the Court also concludes that the debtor/estate dichotomy is applicable and Appellant's pre-

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[7] The court cited the following cases: Barber v. McCord Auto Supply, Inc. (In re Pearson Indus., Inc.), 178 B.R. 753, 761-62 (Bankr.C.D.Ill.1995), which held that "where the secured creditor has no independent claim to the property which is subject to the trustee's avoiding powers and could not recover it from the third party, the secured creditor cannot improve its position because of the trustee's exercise of the avoiding powers and assert an additional claim by claiming it from the trustee who recovered it . . . ."; Lease-A-Fleet, Inc. v. University Cadillac, Inc. (In re Lease-A-Fleet, Inc.), 152 B.R. 431, 439 (Bankr.E.D.Pa.1993), which held that moneys recovered as the result of a preference action are generally not "proceeds" of the creditor's collateral; In re Tek-Aids Indus., Inc., 145 B.R. 253, 256 (Bankr.N.D.Ill.1992), which concluded that "[a]llowing a prepetition blanket security interest to reach preference actions would be tantamount to giving a creditor additional collateral it would not have had if the debtor had not filed a bankruptcy petition. . . ."; Hennessy v. Kennedy (In re Sun Island Foods), 125 B.R. 615, 619-20 (Bankr.D.Hawai'i 1991), which found that "it is illogical to allow a secured creditor to attach the proceeds of recoveries, while at the same time preventing it from compelling a trustee to pursue a preference action.".

petition lien could not have attached to the preference proceeds recovered for the estate by Trustee post-petition. Thus, the Court affirms the decision of the BC.

In affirming, the Court also rejects Appellant's remaining arguments. In particular, the Court rejects Appellant's claim that the BC misconstrued the MESA provisions by assuming that Debtor is the only employer under that act. Although Appellant attempts to claim that the Trustee can also be considered an employer as that term is defined, this Court has long since held otherwise. A trustee in bankruptcy is an "officer of the court" and does not become an "employer" simply by acquiring title to all assets of a bankrupt employer. In re Brewing Park Co., 48 F. Supp. 750, 751 (E.D. Mich. 1942). Indeed, it is generally recognized that

> A trustee in bankruptcy occupies a special fiduciary position. He does not stand merely in the status of the debtor . . . . The (Bankruptcy) Act gives the trustee extraordinary powers to assert claims against property both in the possession of the reorganization court and in the hands of third persons in cases where the debtor would be estopped to act and, in some cases, even where creditors could not succeed.

Williamson v. U.S., 309 F.2d 892, 896 (6th Cir. 1962)

Likewise, the Court also rejects Appellant's claim that the BC effectively avoided or otherwise unlawfully subordinated an unavoidable lien. As the BC noted, the validity of the lien was not disputed, the only issue was whether the liens attached to the recovered preference proceeds. To paraphrase the BC: "[T]he Trustee is simply saying you don't have a lien on this asset . . ." As such, Appellant's extensive discussion about the voidability of the statutory liens is irrelevant. Moreover, while it is true that property that is encumbered by a tax lien enters

the estate subject to that lien, based on the above analysis, Appellant's lien could not attach to property that did not exist until after the preference action. Further, there is no inequity here; the Court is merely following the explicit terms of the Bankruptcy Code, which gives the Trustee power to avoid transfers for the benefit of the estate. Indeed, it is Appellant's position that would create the inequity. Under its analysis, the UA's prior liens on Debtor's property suddenly attached to property that did not exist until the filing of the petition.

IV.

Based on its de novo review of the decision of the BC, the Court concludes that Appellant's arguments are unpersuasive and **AFFIRMS** the decision. Because the decision of the BC is sound, the Court need not address the issue of whether the automatic state prevents the attachment of Appellant's liens to the preference proceeds.

IT IS SO ORDERED.

HON. VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

dated: **NOV 24 1999**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

RANDALL L. FRANK, Trustee,
Plaintiff-Appellee,

v. No. 99-10333

STATE OF MICHIGAN,
UNEMPLOYMENT AGENCY,
DEPARTMENT OF CONSUMER
& INDUSTRY SERVICES,
Defendant-Appellant.

ORDER DENYING DEFENDANT-APPELLANT'S MOTION FOR REHEARING

Victoria A. Roberts, District Judge.

I.

On December 3, 1999, Appellant filed a Motion for Rehearing and Request for Oral Argument. Appellant seeks reconsideration of this Court's November 24, 1999 decision holding that its liens do not attach to preference recoveries. For the reasons explained below, the Court **DENIES** the Motion.

II.

Defendant-Appellant brings its Motion pursuant to Rules 8015 and 8012 of the Federal Rules of Bankruptcy Procedure. Bankruptcy Rule 8015 establishes a time limit on motions for rehearing, but is silent as to the appropriate standards for

granting relief. However, because Rule 8015 was derived from Fed.R.App.P. 40, it is appropriate to look to the appellate rule for guidance. 9 COLLIER ON BANKRUPTCY ¶ 8015.04 at 8015-4 (15th ed.1993). Federal Rule of Appellate Procedure 40(a) provides in part, "[t]he petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." Additionally, Eastern District of Michigan Local Rule 7.1(h) sets forth the grounds for motions for rehearing or reconsideration and provides, in pertinent part, that: "The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof." E.D. Mich. L.R. 7.1(h).

In the present case, Appellant argues that the trustee has a duty to all creditors of the estate, and is obligated to realize the maximum recovery for distribution to creditors. Appellant also claims that Congress did not intend to allow courts to limit the reach of statutory liens under state law via preference actions. However, these points were previously considered by the Court, as they were argued either explicitly or implicitly in Appellant's original brief. Appellant has not shown that these points were overlooked or misapprehended, nor has it shown that the Court was misled by a palpable defect whose correction would cause a different result.

Additionally, Appellant claims that under Michigan law, its statutory liens extend to all property of an employer and continue in effect until satisfied. According to Appellant, the bankruptcy code prohibits only the attachment of liens resulting from security agreements, not statutory liens. Moreover, Appellant points out that 11 U.S.C. § 724 contains no requirement that a tax lien be identified to proceeds of a particular property. Again, however, these arguments were made in Appellant's original brief on appeal and were previously considered by the Court. As such, the Court finds

that the standards for rehearing or reconsideration have not been met.

Finally, Appellant points out that the Supreme Court has stated that a trustee is an employer under the relevant law. Nonetheless, the Court must conclude that this holding would not alter the disposition in this case. The Court is of the view that the dual-entity or dichotomy concept is well supported. In particular, the Court is still persuaded by the reasoning of the court in In re Southeast Railroad, 235 B.R. 619 (Bankr.E.D.Tenn.1996), and finds Appellant's arguments unpersuasive.

III.

In short, Appellant raises issues that were already argued by the parties and considered by the Court. The Court concludes that Appellant has failed to sufficiently demonstrate issues of law or fact that this Court misapprehended, and that it has not shown a palpable defect which, if corrected, would result in a different disposition of the case. The Court also dispenses with oral argument pursuant to Federal Rule of Bankruptcy Procedure 8012 and 8012(3). Accordingly, the Court **DENIES** Appellant's Motion for Rehearing and Request for Oral Argument.

IT IS SO ORDERED.

HON. VICTORIA A. ROBERTS
UNITED STATES DISTRICT

JUDGE
dated: **FEB 03 2000**

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

In re: THOMPSON BOAT, INC. Case No. 93-20546
Chapter 7

Debtor.

_____/

RANDALL L. FRANK, Trustee,

Plaintiff,

-v- A.P. No. 99-2002

STATE OF MICHIGAN, acting through the
MICHIGAN UNEMPLOYMENT AGENCY,

Defendant.

_____/

APPEARANCES:

HENRY L. KNIER, JR.
Attorney for Plaintiff

DONNA K. WELCH
Assistant Attorney General
Attorney for Defendant

OPINION REGARDING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Introduction

The State of Michigan Unemployment Agency (the "UA") filed a proof of claim in this bankruptcy case for pre-petition contributions that the Debtor failed to pay as required by the Michigan Employment Security Act, Mich. Comp. Laws § 421.1 et seq. See Mich. Comp. Laws § 421.13(a) (Employers subject to the Act must pay to the UA "tax contributions . . . for the unemployment compensation fund."). The UA asserts that its claim is secured by a statutory lien. In Count II of his complaint, the chapter 7 trustee seeks a determination that the lien does not encompass proceeds of preference actions brought under 11 U.S.C. § 547(b). Now pending before the Court is the trustee's motion for summary judgment as to Count II. For reasons to be explained, the motion will be granted.

Discussion

The source of the UA's lien is § 15 of the Act. That statute provides:

> [A]ll contributions . . . payable under this act to the commission from an employer . . . that neglects to pay the same when due shall be a first and prior lien upon all property and rights to property, real and personal, belonging to the employer . . . The lien shall attach to the property and rights to property of the employer . . . from and after the date that a report upon which the specific tax is computed is required by this act to be filed. Notice of the lien shall be recorded in the office of the register of deeds of the county in which the property subject to the lien is situated . . . .

Mich. Comp. Laws § 421.15(e). The central issue raised by the trustee's motion is whether proceeds from a preference action' fall within the reach of this statute.

By its own terms, Mich. Comp. Laws § 421.15(e) embraces only those property rights belonging to the employer - in this case, the Debtor. Thus it logically follows that the statute has no application if the right to bring a § 547(b) action belongs to the estate, rather than the debtor.

In the case of In re Winom Tool & Die. Inc., 173 B.R. 613 (Bankr. E.D. Mich. 1994), we concluded that "property interests may be held by the post-petition debtor in its own right (nonestate property) or as debtor in possession (estate property)." Id. at 624-25. See also In re Walat Farms, Inc., 69 B.R. 529, 530 (Bankr. E.D. Mich. 1987) (wherein this Court cited 4 Collier on Bankruptcy, ¶553.08 (15th ed. 1986) for the proposition that "[c]laims arising after the commencement of the case lack the requisite mutuality for set-off, because the postpetition trustee or debtor in possession is a different entity from the prepetition debtor"); In re Hugo, 58 B.R. 903, 908 (Bankr. E.D. Mich. 1986) (where we stated that "the 'debtor in possession is an entity distinct from the debtor'" (citations omitted)); see generally 11 U.S.C. § 1107(a) ("[A] debtor in possession shall have all the rights . . . of a trustee . . . ."). Other courts have reached similar conclusions. See, e.g., Merchants & Farmers Bank of Dumas. Ark. v. Hill, 122 B.R. 539, 542 (E.D. Ark. 1990) ("Simply because the Hills have assumed the status of debtors in possession does not mean that their status individually as debtors is destroyed, any more than if a separate trustee was appointed for the estate.").

There are circumstances, of course, where recognition of the estate/debtor dichotomy is inappropriate. See Winom Tool & Die, 173 B.R. at 622. Such might be the case, for instance, with respect to the trustee's exercise of a right which belonged to the debtor prepetition. See e.g., In re National Fin'l

Alternatives, Inc., 96 B.R. 844, 849-50 n.10 (Bankr. N.D. Ill. 1989) (explicitly rejecting the debtor/estate distinction in a case concerning the respective rights of the IRS and another claimant to the debtor's accounts receivable); see generally 11 U.S.C. §541 (a)(1) (The bankruptcy "estate is comprised of . . . all legal or equitable interest of the debtor in property as of the commencement of the case."). As will be explained, however, we believe that the "duality" concept is indispensable to a proper understanding of the preference provision.

Section 547 states:

> [T]he trustee may avoid any transfer of an interest of the debtor in property -
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made -
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if -
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been mad a; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

For present purposes, the most salient feature of § 547(b) is the fact that the avoidance power is given to the trustee, rather than the debtor. Cf., e.g., 11 U.S.C. § 522(f)(1) (stating that "the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled" (emphasis added)). The Code does permit the debtor to utilize § 547(b) under narrowly defined circumstances. See 11 U.S.C. § 522(h) ("The debtor may avoid a transfer of property of the debtor . . . to the extent that the debtor could have exempted such property . . . if the trustee had avoided such transfer, if . . . such transfer is avoidable by the trustee under section . . . 547, . . . and . . . the trustee did not attempt to avoid such transfer."). But this exception only serves to clarify that debtors *generally* have no right to invoke § 547(b). See, e.g., 5 Collier on Bankruptcy, ¶547. 11 [2] (15th ed. rev. 1999) ("A debtor who is not a debtor in possession cannot maintain an action to set aside his or her own transfer as preferential under § 547.").

This conclusion is unremarkable considering the rationale underlying § 547(b). As a leading treatise explained:

> The purpose of the preference section is twofold. First, by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during the debtor's slide into bankruptcy. The protection thus afforded the debtor often enables the debtor to work a way out of a difficult financial situation through cooperation with all of his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater

> payment than others of his class is required to disgorge so that all may share equally.

Id. at ¶547.01. See also, e.g., In re Ellingsen MacLean Oil Co., 98 B.R. 284, 289 (Bankr. W.D. Mich. 1989). Since the intent of the statute is to promote parity among similarly-situated creditors, it is only natural that the rights thereunder be vested in the trustee, rather than the debtor. See generally, e.g., Ford Motor Credit Co. v. Weaver, 680 F.2d 451, 462 n.8 (6th Cir. 1982) ("A trustee in bankruptcy or a debtor in possession, as a fiduciary, represents both the secured and unsecured creditors of the debtor.").

Further support for the Court's conclusion that debtors have no interest in preference actions is found in the interplay between 11 U.S.C. §§ 724(b) and 551. The latter statute provides that "[a]ny transfer avoided under section . . . 547 . . . is preserved for the benefit of the *estate*." 11 U.S.C. § 551 (emphasis added). Section 724 provides:

> Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title and that secures an allowed claim for a tax . . . shall be distributed -
>
> (1) first, to any holder of an allowed claim secured by a lien on such property . . . that is senior to such tax lien;
> (2) second, to any holder of a claim of a kind specified in section 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) . . . to the extent of the amount of such allowed tax claim that is secured by such tax lien;
> (3) third, to the holder of such tax lien . . . ;

> (4) fourth, to any holder of an allowed claim secured by a lien . . . that is junior to such tax lien;
> (5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph 3 of this subsection; and
> (6) sixth, to the *estate*.

11 U.S.C. § 724(b) (emphasis added). In light of the terminology used in these provisions, it can fairly be said that the trustee acts on behalf of *unsecured* creditors in bringing a preference action. See In re Darnell, 834 F.2d 1263, 1268-69 (6th Cir. 1987) ("Under § 724, property is not distributed to the estate (§ 724(b)(6)) until *all* liens, both tax and nontax, are satisfied . . . . [P]roperty distributed under . . . section [724] . . . does *not* become part of the estate unless or until all secured claims have been satisfied."); see generally Weaver, 680 F.2d at 462 n.8 ("The trustee 'primarily represents the unsecured creditors, and represents the secured creditors only in his capacity as a custodian of the property upon which they have a lien.'" (citations omitted)). And by virtue of § 551, that constituency is the designated beneficiary of the fruits of such an action.

The foregoing considerations notwithstanding, there is a case which suggests that a preference action "belongs" to the debtor. In In re Southwest Equip. Rental, Inc., No. 1-88-00033, 1993 Bankr. LEXIS 1554 (Bankr. E.D. Tenn. Oct. 12, 1993), the IRS argued that its prepetition tax lien attached to whatever proceeds might be realized from "a number of preference and fraudulent conveyance actions" filed by the trustee. Id. at *1. The court ruled in favor of the IRS:

> To the extent the [case cited by the trustee] . . . was asserting that the bankruptcy estate is a separate entity from the taxpayer and therefore

> properties acquired by the estate postpetition cannot secure a prepetition tax obligation, the court rejects this reasoning . . . . As the court stated in In re National Financial Alternative, "if pre-petition liens generally did not attach to property acquired by a debtor post- petition, because the debtor in possession (or the estate) is a separate entity, then [11 U.S.C.] § 552 would be totally unnecessary." [National Fin'l, 96 B.R.] at 849 n.10. The court went on to explain in some detail how such a rule would also place an impossible burden on the IRS in attempting to enforce tax liens against accounts receivable or other impermanent assets. Id.

Southwest Epuipment, 1993 Bankr. LEXIS 1554 at *7 - *8.

As indicated supra p. 3, National Financial - the case cited by Southwest - concerned the respective rights of the IRS and another claimant to "accounts receivable acquired by [the] . . . debtor more than 45 days after the filing of a notice of tax lien." National Fin'l, 96 B.R. at 845. Since § 547(b) was not even at issue in that case, it is unlikely that the court intended to suggest that, § 522(h) notwithstanding, the debtor has an unqualified right to bring a preference action in its individual capacity. Southwest's reliance on National Financial is therefore dubious.

Nor are we persuaded by National Financial's rationale. Consider first the point about "statutory superfluity." Id. at 849 n.10. Section 552 reads as follows:

> (a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any

> security agreement entered into by the debtor before the commencement of the case.
>
> (b)(1). . . [I]f the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest . . . extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law . . .
>
> (2) . . . [I]f the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest . . . extends to property of the debtor acquired before the commencement of the case and to amounts paid as rents of such property . . . , then such security interest extends to such rents . . . .

11 U.S.C. § 552. [8]

As National Financial suggests, the dual-entity concept may in fact render § 552(a) unnecessary insofar as postpetition *estate* acquisitions are concerned. But since that statute also refers to postpetition acquisitions by the debtor, it serves a purpose even if the debtor and the estate are distinct entities. And in those circumstances where the debtor/estate distinction

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[8] The parties agree that this staute does not apply to the UA's non-consensual, statutory lien. See generally 11 U.S.C. §§ 101 (50), (51) and (53) (defining, respectively, the terms "security agreement," "security interest" and "statutory lien").

is overly formalistic, see supra p. 3, a trustee or debtor in possession might legitimately be viewed as exercising rights both in the capacity of trustee *and* debtor.

For these reasons, concern about § 552's "superfluity" is overstated. In addition, while any superfluity may be undesirable, courts must recognize that a certain amount is almost inevitable - particularly in legislation as lengthy and complex as the Bankruptcy Code. See generally Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting . . . ."). In our view, the probative value of the "no-redundancy rule" of statutory construction pales to the point of insignificance given the unmistakable legislative indications that debtors do not "own" preference actions or recoveries. See 11 U.S.C. §§ 547(b) and 522(h). Indeed, the very fact that § 552(a) refers to postpetition acquisitions by the estate *or* the debtor belies the thesis that the two entities are one and the same.

We are also unimpressed with the argument that recognition of the debtor's separate status places an "impossible burden" on statutory lienholders. In the vast majority of cases, it should be relatively easy to determine the portion of estate funds which represents the proceeds of preference actions. And where controversy does arise as to that issue, it can be resolved by the court like any other factual dispute - i.e., on the basis of the evidentiary record.[9]

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[9] In this regard, the UA seems to suggest that differentiating preference proceeds from other assets of the estate is somehow inconsistent with our decision in In re Atlas Commercial Floors, Inc., 125 B.R. 185 (Bankr. E.D. Mich. 1991). See Defendant's Brief at p. 14. Atlas, however, stated only that the equitable doctrine of marshaling was unavailable because the funds which were "'*subject to*' the [Michigan Employment Security Commission's]. . . lien . . . constitute[d] a single fund." Atlas, 125 B.R. at 188 (emphasis added). Since preference proceeds are not "subject to" the UA's lien, there is no tension between Atlas and the holding in this case.

The UA cited several other cases besides Southwest in support of its position. See Defendant's Brief at pp. 16-18 (citing In re Ferguson, 197 B.R. 161 (Bankr. S.D. Fla. 1996); In re Crossroads Market, Inc., 190 B.R. 269 (Bankr. N.J. Miss. 1994); Ellingsen, supra p. 5; In re Figearo, 79 B.R. 914 (Bankr. D. Nev. 1987)). However, two of these cases - Crossroads Market and Figearo - are not on point because, like National Financial, they did not involve preference actions. And Ferguson, while a preference case, is essentially devoid of analysis.

The remaining case, Ellingsen, offered the following rationale. Had the preferential transfer not been made, the property in question would have continued to belong to the debtor and, therefore, would continue to be subject to the statutory lien. Consequently, only the lien holder, and not unsecured creditors, can be said to have been harmed by the transfer. See Ellingsen, 98 B.R. at 291.

The value judgment implicit in this line of reasoning is that unsecured creditors should not be permitted to reap the benefit of a preference action if the transfer was of property which would have been unavailable to that class of creditors had the transfer not been made. This analysis, however, overlooks the fact that the avoidance power afforded by § 547(b) is not something upon which the lienholder ordinarily would have (or properly could have) relied in the first instance. See In re Integrated Testing Prods. Corp., 69 B.R. 901, 905 (D. N.J. 1987) ("[T]o allow the appellant[/secured creditor] to claim these preferences would frustrate the policy of equal treatment of creditors under the Code . . . ."); In re Tek-Aids Indus., Inc., 145 B.R. 253, 256 (Bankr N.D. Ill. 1992) ("The estate's right to sue under § 547 is a special power Congress grants to the [trustee] . . . . Allowing a prepetition blanket security interest to reach preference actions would be tantamount to giving a creditor additional collateral it would not have had if the debtor

had not filed a bankruptcy petition . . . . Such a windfall contradicts any notion of fair and equal treatment among creditors."); see also In re Pearson Indus., Inc., 178 B.R. 753, 761-62 (Bankr. C.D. Ill. 1995) (Altenberger, C.J.) (favorably quoting the same passage from Tek-Aids); In re Bill Perhay Chevrolet, Inc., 172 B.R. 28 (Bankr. C.D. Ill. 1994) (Lessen, J.) (same); In re Sun Island Foods, 125 B.R. 615, 619 (Bankr. D. Haw. 1991) ("[I]t is illogical to allow a secured creditor to attach the proceeds of recoveries, while at the same time preventing it from compelling a trustee to pursue a preference action. If the trustee herein had not pursued the preference actions, the secured creditor could not have sued on its own to recover the preferences. Yet, by the Trustee having pursued the recoveries, the Plaintiff argues that the secured creditor now is in a position to claim the proceeds as covered by their security interest. This is an anomaly, and it results in the use of powers created by the Bankruptcy Code for the benefit of one creditor alone, and is to be avoided."). So while it may be true that unsecured creditors receive something of a windfall in cases fitting this fact pattern, the same would also be true of the lien holder were it to receive the preference recovery. Thus the inequity of the situation is not as compelling as Ellingsen would suggest.

More to the point, this is not an issue which can appropriately be resolved based on judicial notions of equity. Cf. In re Van De Kamp's Dutch Bakeries, 908 F.2d 517, 520 (9th Cir. 1990) ("The Trusts note one court's observation that 'there is an element of unfairness in the result that the Trustee may have the benefit of a fraudulent transfer so as to take priority over judgment lien creditors. . . . If there is any unfairness in this interpretation, however, it is a result of express statutory language, which should be remedied by the legislative, rather than the judicial branch." (citation omitted)); see generally Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420 U.S. 395, 423 (1975) ("Whatever the merits of the complainants' argument as a matter of policy, it is properly

addressed to Congress, not to the courts."). As stated earlier, the question here is whether the Debtor owned an interest in the preferences actions. For the reasons explained, we conclude that it did not. This means that the proceeds of those actions are outside the scope of Mich. Comp. Laws § 421.15(e). See, e.g., Perhav Chevrolet, 172 B.R. at 28; Tek-Aids, 145 B.R. at 256-57.

In closing, we acknowledge that there is support for the view that, if a lien is not extinguished by a preferential transfer, then proceeds of the preference action are likewise subject to the lien. See In re Mid-Atlantic Piping Prods. of Charlotte, Inc., 24 B.R. 314, 322 (Bankr. W.D. N.C.- 1982) ("[I]nventory of the Debtor in which Rock Hill held a valid security interest would still have been subject to the security interest after its transfer to trade creditors *unless* the transfers were authorized. Unless the transfers were authorized, the Trustee's recovery of the transferred inventory or its value pursuant to . . . . § 547 . . . would also be subject to Rock Hill's security interest."); Figearo, 79 B.R. at 917-18 ("[T]he court finds Haley's security interest continued in the inventory items after the transfer to Pacific . . . . Were the trustee to recover the property from Pacific free of any pre-petition encumbrances, he would recover a greater interest in the property than that held by Pacific . . . ."). But see generally 11 U.S.C. § 552(a). Since the UA did not argue otherwise, however, our analysis assumes that its lien terminated upon the transfer Based on the foregoing, an order shall enter granting the Plaintiffs motion for partial summary judgment.[10]

Dated: August 5, 1999.

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[10] Because the Debtor's lack of a proprietary interest in the preference actions is outcome-determinative, we need not address the trustee's contention that the automatic stay imposed by "§ 362. . . prevented postpetition attachment of the []UA's liens." Plaintiffs Brief at p. 5.

U.S. Bankruptcy Judge

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11 U.S.C. § 101. Definitions

In this title - . . .

(53) "statutory lien" means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute. . . .

11 U.S.C. § Sec 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that -

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;
(2) such claim is for unmatured interest;
(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;
(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;
(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;
(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds -

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the

remaining term of such lease, following the earlier of -
(i) the date of the filing of the petition; and
(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;
(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds -

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of -
(i) the date of the filing of the petition; or
(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;
(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or
(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order

for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide.

(c)There shall be estimated for purpose of allowance under this section -

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e) (1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that -

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.
(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under

subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is -

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date -

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include -

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that -

(A) (i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and (ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only

by virtue of section 365 or 544(a)(3) of this title; or

(B) (i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 542 of this title; or

(5) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made -

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition. Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c) (1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law -

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 547. Preferences

(a) In this section -

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property -

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made -

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if

such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if -

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer -

(1) to the extent that such transfer was -

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was -

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor -

(A) to the extent such security interest secures new value that was -

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor -

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of -

(A) (i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or (ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;
(7) to the extent such transfer was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt -

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; or
(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.
(e) (1) For the purposes of this section -

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor

against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made -

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of -

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the

nonavoidability of a transfer under subsection (c) of this section.

11 U.S.C. § 550. Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from -

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from -

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition -

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider; the trustee may not recover under subsection (a) from a transferee that is not an insider. (d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e) (1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of -

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes -

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of -

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

11 U.S.C. § 551. Automatic preservation of avoided transfer

Any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate.

11 U.S.C. § 552. Postpetition effect of security interest

(a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

(b) (1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

(2) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, and notwithstanding section 546(b) of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to amounts paid as rents of such property or the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties, then such security interest extends to such rents and such fees, charges, accounts, or other payments acquired by the estate after the commencement of the case to the extent provided in such security agreement, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

11 U.S.C. § Sec. 724. Treatment of certain liens

(a) The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title.
(b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed -

(1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;
(2) second, to any holder of a claim of a kind specified in section 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;
(3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph (2) of this subsection;
(4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;
(5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and
(6) sixth, to the estate.

(c) If more than one holder of a claim is entitled to distribution under a particular paragraph of subsection (b) of this section, distribution to such holders under such paragraph shall be in the same order as distribution to such holders would have been other than under this section.

(d) A statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1986 shall be treated under subsection (b) of this section the same as if such lien were a tax lien.

26 U.S.C. § 6321. Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

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Mich. Comp. Laws § 211.682 Certificates and notices of liens upon real or personal property; filing.

Sec. 2. (a) Notices of liens upon real property for taxes payable to the state, and certificates and notices affecting the liens shall be recorded in the office of the register of deeds of the county or counties in which the real property subject to a state tax lien is situated.

(b) Notices of liens upon personal property, whether tangible or intangible, for taxes payable to the state and certificates and notices affecting the liens shall be filed as follows:

(1) If the person against whose interest the tax lien applies is a corporation or a partnership whose principal executive office is in this state, as these entities are defined in the applicable tax laws of the state, in the office of the secretary of state.

(2) In all other cases in the office of the register of deeds of the county where the taxpayer resides at the time of filing of the notice of lien.

Mich. Comp. Laws § 421.15 Delinquent contributions.

Sec. 15. (a) Contributions unpaid on the date on which they are due and payable, as prescribed by the commission, shall bear interest at the rate of 1% per month, computed on a day to day basis for each day the delinquency is unpaid, from and after that date until payment plus accrued interest is received by the commission. Amounts illegally obtained or previously withheld from payment and damages that are recovered by the commission under section 54(a) and (b) and sections 54a to 54c of this act shall bear interest at the rate of 1% per month, computed on a day-to-day basis for each day the amounts remain unpaid until payment plus accrued interest is received by the commission. The interest on unpaid contributions, exclusive of penalties, shall not exceed 50% of the amount of contributions due at due date. Interest and penalties collected pursuant to this section shall be paid into the contingent fund. The commission may cancel any interest and any penalty when it is shown that the failure to pay on or before the last day on which the tax could have been paid without interest and penalty was not the result of negligence, intentional disregard of the rules of the commission, or fraud.

(b) The commission may make assessments against an employer, claimant, employee of the commission, or third party who fails to pay contributions, reimbursement payments in lieu of contributions, penalties, forfeitures, or interest as required by this act. The commission shall immediately notify the employer, claimant, employee of the commission, or third party of the assessment in writing by first-class mail. An assessment by the commission against a claimant, an employee of the commission, or a third party under this subsection shall be made only for penalties and interest on those penalties for violations of section 54(a) or (b) or sections 54a to 54c. The assessment, which shall constitute a determination, shall be final unless the employer, claimant, employee of the commission, or third party files with the commission an

application for a redetermination of the assessment in accordance with section 32a. A review by the commission or an appeal to a referee or the appeal board on the assessment shall not reopen a question concerning an employer's liability for contributions or reimbursement payments in lieu of contributions, unless the employer was not a party to the proceeding or decision where the basis for the assessment was determined. An employer may pay an assessment under protest and file an action to recover the amount paid as provided under subsection (d). Unless an assessment is paid within 15 days after it becomes final the commission may issue a warrant under its official seal for the collection of an amount required to be paid pursuant to the assessment. The commission through its authorized employees, under a warrant issued, may levy upon and sell the property of the employer that is used in connection with the employer's business, or that is subject to a notice to withhold, found within the state, for the payment of the amount of the contributions including penalties, interests, and the cost of executing the warrant. Property of the employer used in connection with the employer's business shall not be exempt from levy under the warrant. Wages subject to a notice to withhold shall be exempt to the extent the wages are exempt from garnishment under the laws of this state. The warrant shall be returned to the commission together with the money collected by virtue of the warrant within the time specified in the warrant which shall not be less than 20 or more than 90 days after the date of the warrant. The commission shall proceed upon the warrant in all respects and with like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgments by a court of record. The state, through the commission or some other officer or agent designated by it, may bid for and purchase property sold under the provisions of this subsection. If an employer, claimant, employee of the commission, or third party, as applicable, is delinquent in the payment of a contribution, reimbursement payment in lieu of contribution, penalty, forfeiture, or interest provided for in this act, the

commission may give notice of the amount of the delinquency served either personally or by mail, to a person or legal entity, including the state and its subdivisions, that has in possession or under control a credit or other intangible property belonging to the employer, claimant, employee of the commission, or third party, or who owes a debt to the employer, claimant, employee of the commission, or third party at the time of the receipt of the notice. A person or legal entity so notified shall not transfer or make a disposition of the credit, other intangible property, or debt without retaining an amount sufficient to pay the amount specified in the notice unless the commission consents to a transfer or disposition or 45 days have elapsed from the receipt of the notice. A person or legal entity so notified shall advise the commission within 5 days after receipt of the notice of a credit, other intangible property, or debt, which is in its possession, under its control, or owed by it. A person or legal entity that is notified and that transfers or disposes of credits or personal property in violation of this section is liable to the commission for the value of the property or the amount of the debts thus transferred or paid, but not more than the amount specified in the notice. An amount due a delinquent employer, claimant, employee of the commission, or third party subject to a notice to withhold shall be paid to the commission upon service upon the debtor of a warrant issued under this section.

(c) In addition to the mode of collection provided in subsection (b), if, after due notice, an employer defaults in payment of contributions or interest on the contributions, or a claimant, employee of the commission, or third party defaults in the payment of a penalty or interest on a penalty, the commission may bring an action at law in a court of competent jurisdiction to collect and recover the amount of a contribution, and any interest on the contribution, or the penalty or interest on the penalty, and in addition 10% of the amount of contributions or penalties found to be due, as damages. An employer, claimant, employee of the commission, or third party adjudged in default

shall pay costs of the action. An action by the commission against a claimant, employee of the commission, or third party under this subsection shall be brought only to recover penalties and interest on those penalties for violations of section 54(a) or (b) or sections 54a to 54c. Civil actions brought under this section shall be heard by the court at the earliest possible date. If a judgment is obtained against an employer for contributions and an execution on that judgment is returned unsatisfied, the employer may be enjoined from operating and doing business in this state until the judgment is satisfied. The circuit court of the county in which the judgment is docketed or the circuit court for the county of Ingham may grant an injunction upon the petition of the commission. A copy of the petition for injunction and a notice of when and where the court shall act on the petition shall be served on the employer at least 21 days before the court may grant the injunction.

(d) An employer or employing unit improperly charged or assessed contributions provided for under this act or a claimant, employee of the commission, or third party improperly assessed a penalty under this act and who paid the contributions or penalty under protest within 30 days after the mailing of the notice of determination of assessment, may recover the amount improperly collected or paid, together with interest, in any proper action against the commission. The circuit court of the county in which the employer or employing unit or claimant, employee of the commission, or third party resides, or, in the case of an employer or employing unit, in which is located the principal office or place of business of the employer or employing unit, shall have original jurisdiction of an action to recover contributions improperly paid or collected or a penalty improperly assessed whether or not the charge or assessment has been reviewed by the commission or heard or reviewed by a referee or the appeal board. The court shall not have jurisdiction of the action unless written notice of claim is given to the commission at least 30 days before the institution of the action. In an action to recover contributions paid or

collected or penalties assessed, the court shall allow costs to such an extent and in a manner as it may consider proper. Either party to the action shall have the right of appeal, as is now provided by law, in other civil actions. An action by a claimant, employee of the commission, or third party against the commission under this subsection shall be brought only to recover penalties and interest on those penalties improperly assessed by the commission under section 54(a) or (b) or sections 54a to 54c. If a final judgment is rendered in favor of the plaintiff in an action to recover the amount of contributions illegally collected or charged, the treasurer of the commission, upon receipt of a certified copy of the final judgment, shall pay the amount of contributions illegally collected or charged or penalties assessed from the clearing account, and pay interest as may be allowed by the court, in an amount not to exceed the actual earnings of the contributions as may have been found to have been illegally collected or charged, from the contingent fund.

(e) Except for liens and encumbrances recorded before the filing of the notice provided for in this section, all contributions, interest, and penalties payable under this act to the commission from an employer, claimant, employee of the commission, or third party that neglects to pay the same when due shall be a first and prior lien upon all property and rights to property, real and personal, belonging to the employer, claimant, employee of the commission, or third party. The lien shall continue until the liability for that amount or a judgment arising out of the liability is satisfied or becomes unenforceable by reason of lapse of time. The lien shall attach to the property and rights to property of the employer, claimant, employee of the commission, or third party, whether real or personal, from and after the date that a report upon which the specific tax is computed is required by this act to be filed. Notice of the lien shall be recorded in the office of the register of deeds of the county in which the property subject to the lien is situated, and the register of deeds shall receive the notice for recording. This

subsection shall apply only to penalties and interest on those penalties assessed by the commission against a claimant, employee of the commission, or third party for violations of section 54(a) or (b) or sections 54a to 54c. If there is a distribution of an employer's assets pursuant to an order of a court under the laws of this state, including a receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceedings, contributions then or thereafter due shall be paid in full before all other claims except for wages and compensation under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, being sections 418.101 to 418.941 of the Michigan Compiled Laws. In the distribution of estates of decedents, claims for funeral expenses and expenses of last sickness shall also be entitled to priority.

(f) An injunction shall not issue to stay proceedings for assessment or collection of contributions, or interest or penalty on contributions, levied and required by this act.

(g) A person or employing unit, that acquires the organization, trade, business, or 75% or more of the assets from an employing unit, as a successor defined in section 41(2), is liable for contributions and interest due to the commission from the transferor at the time of the acquisition in an amount not to exceed the reasonable value of the organization, trade, business, or assets acquired, less the amount of a secured interest in the assets owned by the transferee that are entitled to priority. The transferor or transferee who has, not less than 10 days before the acquisition, requested from the commission in writing a statement certifying the status of contribution liability of the transferor shall be provided with that statement and the transferee is not liable for any amount due from the transferor in excess of the amount of liability computed as prescribed in this subsection and certified by the commission. At least 2 calendar days not including a Saturday, Sunday, or legal holiday before the acceptance of an offer, the transferor, or the

transferor's real estate broker or other agent representing the transferor, shall disclose to the transferee on a form provided by the commission, the amounts of the transferor's outstanding unemployment tax liability, unreported unemployment tax liability, and the tax payments, tax rates, and cumulative benefit charges for the most recent 5 years, a listing of all individuals currently employed by the transferor, and a listing of all employees separated from employment with the transferor in the most recent 12 months. This form shall specify such other information, as determined by the commission, as would be required for a transferee to estimate future unemployment compensation costs based on the transferor's benefit charge and tax reporting and payment experience with the commission. Failure of the transferor, or the transferor's real estate broker or other agent representing the transferor, to provide accurate information required by this subsection is a misdemeanor punishable by imprisonment for not more than 90 days, or a fine of not more than $2,500.00, or both. In addition, the transferor, or the transferor's real estate broker or other agent representing the transferor, is liable to the transferee for any consequential damages resulting from the failure to comply with this subsection. However, the real estate broker or other agent is not liable for consequential damages if he or she exercised good faith in compliance with the disclosure of information. The remedy provided the transferee is not exclusive, and is not to be construed to reduce any other right or remedy against any party provided for in this or any other act. Nothing in this subsection shall be construed to decrease the liability of the transferee as a successor in interest, or to prevent the transfer of a rating account balance as provided in this act. The foregoing provisions are in addition to the remedies the commission has against the transferor.

(h) If a part of a deficiency in payment of the employer's contribution to the fund is due to negligence or intentional disregard of the rules of the commission, but without intention to defraud, 5% of the total amount of the deficiency, in

addition to the deficiency and in addition to all other interest charges and penalties provided herein, shall be assessed, collected, and paid in the same manner as if it were a deficiency. If a part of a deficiency is determined in an action at law to be due to fraud with intent to avoid payment of contributions to the fund, then the judgment rendered shall include an amount equal to 50% of the total amount of the deficiency, in addition to the deficiency and in addition to all other interest charges and penalties provided herein.

(i) If an employing unit fails to make a report as reasonably required by the rules of the commission pursuant to this act, the commission may make an estimate of the liability of that employing unit from information it may obtain and, according to that estimate so made, assess the employing unit for the contributions, penalties, and interest due. The commission shall have the power only after a default continues for 30 days and after the commission has determined that the default of the employing unit is willful.

(j) An assessment or penalty with respect to contributions unpaid is not effective for any period before the 3 calendar years preceding the date of the assessment.

(k) The rights respecting the collection of contributions and the levy of interest and penalties and damages made available to the commission by this section is additional to other powers and rights vested in the commission in pursuance of the other provisions of this act. The commission is not precluded from exercising any of the collection remedies provided for by this act even though an application for a redetermination or an appeal is pending final disposition. (l) A person recording a lien provided for in this section shall pay a fee of $2.00 for recording a lien and a fee of $2.00 for recording a discharge of a lien.

Supreme Court, U.S.
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No. 01-629

In The

Supreme Court of the United States

MICHIGAN STATE UNEMPLOYMENT AGENCY, DEPARTMENT OF CONSUMER & INDUSTRY SERVICES,

Petitioner,

v.

RANDALL L. FRANK, Trustee,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a valid, properly perfected, prepetition statutory tax lien of the Michigan Employment Security Commission (now the Michigan Unemployment Agency) against a prepetition debtor attach to postpetition preference action recoveries made under 11 U.S.C. § 547(1986) by a Chapter 7 bankruptcy trustee?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Randall L. Frank, Chapter 7 Trustee, Respondent, Plaintiff below, and the Michigan Unemployment Agency, as Petitioner, Defendant below. This proceeding arose within the Chapter 7 Bankruptcy case of Thompson Boat Company, Case No. 93-20546, pending in the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division.

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Opinion of the Bankruptcy Court	Unreported

COUNTER-STATEMENT OF THE CASE

The Michigan Employment Security Commission, now known as the Michigan Unemployment Agency ("UA"), held a prepetition statutory tax lien against Thompson Boat Company ("Thompson Boat") for unemployment taxes. This tax lien arose under Mich. Comp. Laws § 421.15(e) (1992) which provides for a lien that attaches to "all property and rights to property" of the Debtor. The lien was properly perfected by recording with the Register of Deeds, giving the lien priority over any subsequently filed liens. Mich. Comp. Laws § 421.15(e). Under this section, "the lien shall *attach* to the property and rights to property of the employer . . . whether real or personal. . . . " The UA claims a secured claim of about $230,000.

On May 19, 1993, Thompson Boat filed its Chapter 11 bankruptcy petition and its case was converted to Chapter 7 on August 19, 1994. Randall L. Frank ("Trustee") was appointed as the Chapter 7 trustee and he remains the trustee. The Trustee's administration of the Thompson Boat bankruptcy case included the recovery of "preferences" under 11 U.S.C. § 547 and 11 U.S.C. § 551 (1978) in excess of $300,000. These recoveries were from parties who were creditors of Thompson Boat during the preference period that received payments against balances due them ("preference recoveries"). The UA acknowledges that it had no state law power to recover these preferences outside bankruptcy.

The Trustee asserted that the UA's prepetition lien did not attach to the preference recoveries. The United States Bankruptcy Court for the Eastern District of Michigan, Northern Division, Honorable Arthur J. Spector, ruled in favor of the Trustee and determined that the UA lien did not attach to the preference recoveries. That decision was upheld by the United States District Court for the Eastern District of Michigan, Honorable Victoria A. Roberts, and subsequently by the Court of Appeals for the Sixth Circuit. The UA has petitioned for review by this Court.

REASONS TO DENY THE WRIT

1. SUMMARY OF ARGUMENT

The decision of the Sixth Circuit is in accord with existing precedent and respects the validity of liens that have properly attached to assets. In the underlying case,

the UA's lien was not effective against the third parties that were paid prepetition by Thompson Boat because the UA had no legal basis to recover money from the recipient. Further, the UA's lien did not "reattach" after the Trustee applied the Bankruptcy Code preference statute to recover money from the recipient.

2. THE LOWER COURT'S DECISION DOES NOT DEPART FROM PRECEDENT.

The Sixth Circuit did not depart from established precedent in its decision. The cases cited by the UA established that property subject to a valid lien generally remains subject to that lien when a bankruptcy is filed. This principle is untouched by the decision in this case because none of the cited cases involve preference recoveries.

The UA cited four Supreme Court cases as its basis for claiming that the decision of the Sixth Circuit departs from established precedent. In *Long v. Bullard*, 117 U.S. 617, 620-621, 6 S.Ct. 917, 918, 29 L.Ed. 1004 (1886) this Court held that a prepetition lien passes through bankruptcy unaffected. The Sixth Circuit decision is in accord with *Long*. The lower court found that the UA lien is unaffected by the Thompson Boat bankruptcy, and further, that it is also not "enhanced" by the bankruptcy to cover preference recoveries.

In a similar "controlling" precedent raised by the UA, this Court stated that once attached, a lien follows property wherever transferred. *United States v. Bess*, 357 U.S. 51, 57, 78 S.Ct. 1054, 1058, 2 L.Ed.2d 1135 (1958). As indicated above, the UA does not assert that it had an

enforceable lien on the funds in the hands of creditors receiving payment from the Debtor, so the principle espoused in *United States v. Bess* has no bearing on the facts of this case. The UA's lien ceased to exist when the funds paid by the debtor were received by the creditor. In fact, *United States v. Bess* supports the decision in this case. In that case, this Court held that because the owner of the life insurance policies at issue had no "property" interest in the death benefit payable upon his death, the Internal Revenue Service lien against all of the decedent's assets *did not attach* to the death benefit payable to his beneficiary. This holding recognizes that unless the lien has attached to property belonging to the debtor, the lien is not effective.

The UA's third "controlling" case is *Michigan v. United States*, 317 U.S. 338, 63 S.Ct. 302, 87 L.Ed. 312 (1943). *Michigan* simply stands for the already discussed principle that once a lien attaches, it remains attached even if the property is transferred. *Michigan*, 317 U.S. at 340. Again, the UA does not assert that it had an enforceable lien on money in the hands of the creditors receiving payment from the debtor.

Last, in *Johnson v. Home State Bank*, 501 U.S. 78, 85, 111 S.Ct. 2150, 2155, 115 L.Ed.2d 66 (1991), this Court stated that a non-recourse lien is a "claim" for bankruptcy purposes. This principle is unaffected by the Sixth Circuit's decision that the lien does not attach to preference recoveries.

Thus, the lower courts have followed the controlling precedent pointed out by the UA. This Court has not

previously addressed the direct issue of whether a prepetition statutory lien attaches to preference recoveries and the Sixth Circuit is the only circuit to do so to date. Such a first-of-its-kind ruling is not the kind of decision this Court historically reviews, especially where there is no error in the courts below, as in this case.

3. PREPETITION LIEN NOT ATTACHED AT TIME OF BANKRUPTCY FILING.

Under the statute at issue in this case, Mich. Comp. Laws § 421.15(e), the UA's lien attaches to "all property and rights to property, real and personal, belonging to the employer." In this case, the employer/debtor had no "right to" the money it had paid out prepetition once paid to a creditor. The lien was extinguished as to these funds. The UA has pointed to no legal authority to the contrary. As a result, the UA had no lien on potential preference recoveries at the time of the bankruptcy filing.

The UA conveniently avoids the fact that at the time of bankruptcy filing, the UA lien was not an encumbrance against the money Thompson Boat had paid recipients prepetition because the money was not its property. This fact destroys the UA's case. The UA has cited no Michigan law that provides for the position it now takes with regard to its lien. Further, no Michigan case provides for the continuation of a lien on money transferred by a debtor to a recipient for a legitimate business purpose. No reported Michigan decision indicates that the UA has ever tried to recover money transferred by a debtor to a recipient. This is because no lien rights attach to money once paid to third parties.

4. A TRUSTEE HAS POWERS INDEPENDENT OF THOSE OF DEBTORS.

The UA contends that the Trustee stands in the shoes of the debtor. While this proposition is true, a Chapter 7 trustee also has powers independent of those of a debtor.

Relevant in this case is the Trustee's statutory power to recover payments made to third parties by a debtor during a period termed the "preference period." See 11 U.S.C. § 547. This recovery power was not available to a debtor or a creditor under Michigan law at the time of the Bankruptcy filing.[1] Also, this power is not available to individual creditors in a bankruptcy case, and is not available to the debtor that has filed bankruptcy. *In re Natchez Corp. of W. Va.*, 953 F.2d 184, 187 (5th Cir. 1992).

The trustee, as plaintiff in a preference case, stands as a representative of the bankruptcy estate, not as a representative of the debtor. Contrary to the UA's assertions, this added power granted to a trustee is the basis for the Sixth Circuit decision in this case.

5. THERE IS AN ESTATE/DEBTOR DICHOTOMY.

While the debtor's assets usually become part of the bankruptcy estate's assets, there are instances where the

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[1] Michigan law now provides for limited rights to recover preferential payments. Mich. Comp. Laws §§ 566.31-566.43 (1998).

estate's assets are entirely separate. Certainly, liens continue to encumber the debtor's assets when, upon bankruptcy filing, they enter the bankruptcy estate. In contrast, the assets in question in this case – preference recoveries – exist only *within* a bankruptcy estate.

No court has ever rejected the estate/debtor dichotomy in the context of preference actions taken by a trustee. This Court addressed the estate/debtor dichotomy with regard to collective bargaining agreements in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528, 104 S.Ct. 1188, 1197, 79 L.Ed.2d 482 (1984). Under the circumstances in that case, this Court stated:

> For our purposes, it is sensible to view the debtor-in-possession as the same "entity" which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing.

In this case, the lower court took note of the *NLRB v. Bildisco & Bildisco* holding. It determined that a distinction exists between the *NLRB v. Bildisco & Bildisco* executory contract context under 11 U.S.C. § 365 (1992) and the preference action context in this case. Executory contracts exist prepetition and flow into the bankruptcy estate subject to new restrictions and powers arising from the Bankruptcy Code. Preference actions have no existence prepetition and arise only within a bankruptcy case because of specific powers granted to a trustee under § 547.

Further, the Bankruptcy Code clearly provides that a debtor does not have an interest in money recovered from

a preference action because the avoided transfer is "preserved for the benefit of the estate." 11 U.S.C. § 551. Also, § 552 of the Bankruptcy Code recognizes a distinction between the estate and the debtor. That section discusses the effect of a security agreement on two groups of assets:

> A. those acquired by the *estate* after commencement of a bankruptcy case, and
>
> B. those acquired by the *debtor* after commencement of a bankruptcy case.

11 U.S.C. § 552(a) (1984).

Judge Spector in *In re Winom Tool and Die, Inc.*, 173 B.R. 613 (Bankr. E.D. Mich. 1994) set forth a clear analysis of the dichotomy in the context of whether property remains within the bankruptcy estate or revests in the debtor upon confirmation of a Chapter 11 plan. The bankruptcy court concluded in that case that property "may be held by a post-petition debtor in its own right (non-estate property) or as debtor in possession (estate property)." *In re Winom Tool and Die, Inc.*, 173 B.R. at 624-625.

The UA relies on *In re Ferguson*, 197 B.R. 161 (Bankr. S.D. Fla. 1996) for its position that tax liens extend to preference recoveries. While the *Ferguson* court held so, it provided no analysis to support its position and was commenting on the breadth of a tax lien with regard to preference recoveries made in an earlier and separate bankruptcy case that had been filed by the debtor and that was closed. See, *Ferguson*, 197 B.R. at 163. *Ferguson* is thus easily distinguishable and provides no persuasive authority in this case.

The UA also relies on *In re National Financial Alternatives, Inc.*, 96 B.R. 844 (Bankr. N.D. Ill. 1989). This case is also distinguishable because it did not involve the preference action context. As recognized by Judge Spector, below, the *National Financial* case limited its analysis to the effect of 11 U.S.C. § 552.

The arguments of the UA are unpersuasive and fail to build a basis to question the Sixth Circuit decision. The UA is seeking to elevate its prepetition lien rights that are governed by Michigan law into a type of "super-lien" that can attach to property the Debtor could not own (the preference recoveries).

CONCLUSION

No compelling reason exists for granting the UA's Petition. Therefore the Trustee requests denial of the Petition for a Writ of Certiorari.

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Respectfully submitted,

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